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PREFACE

TO THE THIRD EDITION

We have been asked to prepare for press a third edition of this unpretentious work, and had we not been requested to make it a cheap manual we should have added considerably to its length. We have thoroughly revised but not materially lengthened it.

We sincerely hope that students, especially those preparing for the Bar, will not treat this book as a vade mecum, but merely use it to condense knowledge previously acquired from the works of Maitland, Dicey, Anson, Dr. Carter, Dr. Holdsworth and Professor Lowell.

We also wish to point out that as a manual on Constitutional Law cannot conveniently include more than a modicum of Legal History, the student who is desirous of passing a modern Constitutional Law Examination should study separately the works on legal history of at least one of the following authors:— Dr. Carter, Professor Jenks, Mr. Storry Deans, K.C., or Mr. Harold Potter. The History of the Law of Real Property by the late Sir Kenelm Digby is a classic.

We are also much indebted to one or two reviewers for calling our attention to errors in the last edition, which we have done our best to correct.

Finally we must express our gratitude to officials in the India Office for their courteous assistance in connexion with our Excursus on the System of Government in India.

D. C.
C. A.

June, 1925

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LIST OF WORKS.

The following is a list of the works referred to *inter alia* in this book:—

ANSON, Law and Custom of the Constitution

AUSTIN, Lectures on Jurisprudence

BLACKSTONE'S Commentaries.

BROOM'S Constitutional Law

—— Legal Maxims

BRYCE, Studies in History and Jurisprudence

CARTER, History of English Legal Institutions

CHITTY, Prerogative of the Crown.

CRAIES, Treatise on Statute Law

CRIPPS, Church and Clergy.

CRUISE on Dignities.

DICEY, Law of the Constitution

Encyclopædia of the Laws of England

FEILDEN, Constitutional History of England

HALL, International Law

— , Foreign Powers and Jurisdiction of the British Crown

HALSBURY, Laws of England

HALLAM, Constitutional History

HAWKINS, Pleas of the Crown

HOLLAND, Elements of Jurisprudence

ILBERT, Parliament

—— , Manual of Procedure

LANGMEAD (TASWELL), English Constitutional History.

LOWELL, Government of England.

MAITLAND, Constitutional History of England.

MAY, Constitutional History.

——, Parliamentary Practice.

PALMER, Peerage Law in England

PHILLIMORE, Ecclesiastical Law.

POLLARD, Evolution of Parliament.

ODGERS, The Common Law of England.
——, Law of Libel.
——, Local Government.
ROUND, Peerage and Pedigree.
SAFFORD AND WHEELER, Practice of the Privy Council
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STUBBS, Constitutional History.
THOMAS, Leading Cases in Constitutional Law (5th ed.).
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ERRATA.

On page 67, second para., in lieu of words Post Office Act, 1870, *substitute* words Post Office Act, 1908, c. 48.

On same page, third para , *read* Post Office Act, 1908, c. 48, *for* Post Office Protection Act, 1884, c. 76.

On page 91, last para., first line, *for* word Felony *read* Forfeiture.

On page 92, third para., headed " Procedure in Treason," *read* William III. *instead* of Edward VI.

On page 152, at end of para. headed "Civil Proceedings at the Suit of the Crown," *add* in a bracket words [Cf " Annual Practice," 1912].

On page 235, seventh line from end of page should *read* as follows : " Could require him to seal a document called a Bill of Exceptions."

On page 246, third para., third line, *read* Edward III. *instead* of Edward II.

On page 319, in para. headed " The Sinking Funds," *for* words Sinking Fund Act, 1878, *read* Sinking Fund Act, 1875

On page 331, second para. should *read* as follows : " 3. Bankruptcy Officials (Bankruptcy Act, 1914)."

Outlines
OF
CONSTITUTIONAL LAW.

PART I.
Introductory.

CHAPTER I.
INTRODUCTORY DEFINITIONS.

The State.—A State is an independent political society, occupying a defined territory (*a*), the members of which are united together for mutual protection and assistance. Its function is to repel aggression from without, and to maintain law and order within its own dominions.

Government defined.—The Sovereign, according to Austin, is the person or persons having supreme authority in an independent political society, and in every State there must be a sovereign power which exercises and controls the functions of government, and conducts and regulates the intercourse with other political societies. "The aggregate of powers," says Sir William Markby, "which is possessed by the rulers of a political society is called sovereignty. A single ruler, where there is one,

(*a*) The territory of a State includes its territorial waters. As to the British doctrine of territorial waters and the marine league limit, see the Territorial Waters Jurisdiction Act, 1878 (c. 73), passed in consequence of the conflicting opinions in the *Franconia Case* (1876), 2 Ex. D. 62 (a case of manslaughter on a foreign ship by a foreigner). It has recently been decided that an island which comes into existence within the marine league limit belongs to the British Crown (*Secretary of State for India* v. *Sri Raja Rao* (1916), 85 L. J. P. C. 222).

is called the Sovereign; the body of rulers, where there are several, is called the Sovereign Body, or the Government, or the Supreme Government. The rest of the members of a political society, in contradistinction to the rulers, are called the subjects." (Elements of Law.)

The internal functions of government are commonly divided into three categories, namely—(1) legislative, (2) judicial, and (3) executive. The legislature makes, alters and repeals the laws. The judicature, or judicial bench, interprets and applies them; the executive carries them into effect. The sovereign power of a State may be vested in a single individual, as in an autocracy, or in a smaller or larger body of citizens, as in the case of an oligarchy or of a democracy. The allocation of sovereign powers may vary indefinitely, but whatever the form of government may be, its functions must, in a modern State, be delegated to a large number of persons. Sir William Anson divides those persons into the following classes: Legislators, maintainers of order, and protectors of State independence in dealings with other societies.

Constitution defined.—The form and structure of government adopted by a particular State is called its Constitution. By the Constitution of a country, says Paley, is meant so much of its laws as relates to the designation and form of its legislature; the rights and functions of the several parts of the legislative body; and the structure, office, and the jurisdiction of the courts of justice (Moral Philosophy, bk. VI. ch. 7). A more adequate definition is suggested incidentally by Chancellor Kent in his commentary on American laws. The power of making laws, he says, is the supreme power in the State, and the department in which it resides will have such a preponderance in the political system that the principle of separation between the Legislature and other branches of the Government ought to be sharply defined. The Constitution of the United States has observed this demarcation with great fidelity. It has not only made a general delegation of the legislative power to one branch of the Government, of the executive to another, and of the judicial to a third, but it has specially defined the general powers and duties of each of these branches.

This suggests what is perhaps the most serviceable definition of a Constitution, that of Dicey. According to him, the Constitution of any country is that which determines the distribution and exercise of sovereign power within that country.

Professor Ahrens defines the Constitution of a country as "that *tout ensemble* (entirety) of fundamental institutions and laws by which the action of government (administration) and all the citizens are regulated" (cited Holland, Jurisprudence, p. 306).

Constitutions, rigid or flexible.—Constitutions may be classified in various ways—as federal or non-federal, autocratic or democratic. But from the legal point of view the division into rigid and flexible is the most important (cf. Bryce, Studies in History and Jurisprudence, ch. 3). A rigid Constitution is one which is founded on fundamental written laws, whilst in a flexible Constitution all laws can be altered by the same machinery. By a fundamental law is meant a law dealing with the framework of the Constitution, which can only be altered by a special machinery provided by the Constitution for that purpose. The United States furnishes the palmary example of a rigid Constitution. Its Constitution, as framed in 1787, can only be altered on the motion of two-thirds of each House of Congress, and the proposed alteration must be ratified by the legislatures of three-fourths of the States composing the Union. In England, on the other hand, an alteration in the Constitution, such as an amendment in the rules relating to the succession to the Crown, can be effected by exactly the same machinery as an alteration in any ordinary law. But whenever a Constitution is reduced to writing, it must contain a certain element of rigidity even in the infrequent case where it can be altered by the ordinary law-making procedure. It can only be altered consciously and intentionally, whereas in so far as a Constitution depends on custom or convention, it may be altered gradually and imperceptibly by the adoption of new precedents, or by the obsolescence of old. The main characteristic of a Constitution founded on fundamental laws is this: the laws passed by the legislature may conflict with a fundamental law, and in that case it becomes the function of the courts of justice to declare their invalidity. If a law passed

by a State in America contravenes any provision of the Federal Constitution, the Supreme Court of the United States condemns it as *ultra vires*, just as the English Judicial Committee of the Privy Council declares invalid any colonial law which conflicts with the provisions of an imperial statute. In the allocation of sovereign powers under a rigid Constitution, the judicial bench, for certain purposes, is put in a position of superiority over the legislative department of government (cf. Lecky's Democracy and Liberty, ch. 1, p. 64).

The earliest important instance of a written Constitution in modern times is that of the United States. It was a written Constitution, and necessarily rigid. One great feature of the American Constitution, following the doctrine of Montesquieu, was the "séparation des pouvoirs," *i.e.*, the laying down of a strict line of demarcation between legislature, judicature, and executive.

Though these functions are separate, they occasionally overlap, *e.g.*, the President cannot declare war or make peace without the consent of two-thirds of the Senate, and the Senate also must be consulted as to high patronage.

A written Constitution based on the separation of powers places the head of the Executive in a difficult position. The American President goes down to Congress at its opening, and states the requirements of the Government, but his speech bears no resemblance whatever to the *oratio principis in senatu habita*, or even to the Speech from the Throne in the English Parliament. The President is not a member of the legislature, nor can he procure the passing of any law unless he can obtain the help of influential coadjutors in Congress.

Again, in rigid Constitutions the judges can disregard any statute which conflicts with the written Constitution. There is, accordingly, a danger of their causing mischief by overzeal for its observance, or, on the other hand, though it may seldom happen, by their misinterpreting the law owing to party bias or influence.

Flexible Constitutions are characterised by (1) adaptability to changed conditions, the legislature being able to destroy the whole fabric of the Constitution by a single enactment,

(2) The relationship between rulers and ruled, and the fundamental rights of citizens, are scantily defined, much being left to conventional rules of positive morality. (3) They are relics of antiquity.

Federal States.—All States are either unitary or federal.

A unitary State is one in which there is a sovereign legislature, and in fact there is only one State. It may also contain subordinate legislative bodies, but the Acts of the sovereign legislature will in every case override, in the event of a clash, those of the subordinate bodies. Thus a statute of the Imperial Parliament will in every case override any bye-law, or any Act of any Colonial legislature, with which it may happen to be in conflict.

A federal State is one whose Constitution apportions the sovereign power between a central or "federal" legislature on the one hand, and a system of local legislatures on the other, in such a way that each is sovereign within its prescribed sphere but neither may trench on the province allotted to the other. Such an apportionment may be achieved in two ways. Either as in the United States of America, the Constitution vests specified powers in the central body and leaves to the constituent units the whole undefined residue of powers, or (as in Canada) it may lodge specified powers in the units, and vest the residue in the central body. There are *dicta* of the Privy Council to the effect that in the latter case what results is not a federal State in the true sense of the word (*Att.-Gen. for Australia* v. *Colonial Sugar Refining Co.*, [1914] A. C. 237, and *Bonanza Creek Gold Mining Co., Lim.* v. *Rex*, [1916] A. C. at p. 579).

The purpose of a federal scheme is, according to Lord Bryce, to hold minor communities together (Essays in History and Jurisprudence, vol. 2, ch. 3); or, according to Dicey, to reconcile national unity and power with the maintenance of State rights (Dicey, ch. 3, p. 184, 5th ed.). It is an appropriate form of combination for States which desire "union as opposed to unity," affording as it does the means of mutual defence against other political societies while reserving to the component units as much independence as is compatible with the purpose for which they amalgamate. Where federalism exists the Constitution is inevit-

ably a written one, and the Courts can pronounce on the validity of any law which is at variance therewith.

Within the class of federal States some authors distinguish a species—"Confederated States"—in which the central authority exercises the minimum of authority over the units.

The recognition by the Treaty of Versailles of the self-governing Dominions as separate signatories of the Treaty and separate members of the League of Nations is a large step forward in their progress (in practice though not in law) towards the status of independent nations.

Requisites of a successful Federation.—The following are the requisites of a successful federation :—

1. A group of States banded together by a common nationality, physical contiguity, or long historical association.

2. A federal *esprit de corps.*

3. Such judicious distribution of sovereign powers between the Federal Government on the one hand and the States forming the union on the other as to obviate friction.

4. A carefully selected bench of judges, who should be well paid and be permanent officials not changing with the Government.

5. It being difficult to provide for every possible contingency in framing a Constitution, there should be a clear understanding as to legislation on topics not specifically allocated either to the supreme Government or the individual States (*b*).

Federalism, according to Professor Dicey, has the following characteristics :—

(A) The Constitution is supreme.

(B) The powers of government are split up amongst bodies with limited and co-ordinate authority.

(C) The duty of interpreting the Constitution falls upon the judicial bench.

(*b*) *Concomitants of a Federation.*—In every federal community one finds (1) federal laws and State laws, and where, as in the case of a British Dominion, the federal Government is not sovereign, there must be imperial laws also, which the citizens of the composite State have to obey; (2) there must be federal taxation and State taxation; (3) there must be federal officials and State officials, unless either class of officials act in a dual capacity (cf. Bryce, vol. 1, ch 3).

These characteristics necessitate a written Constitution dividing the ordinary powers between the Federal Government and the State legislatures. Again, federal Constitutions must be rigid in the sense that special machinery must be employed to change fundamental or, rather, constitutional laws. Finally, each State must be a subordinate law-making body (Dicey, pt. I. ch. 3).

In the federal State, as compared with the State which is unitary, there is weak government, a tendency to conservatism and a predominance of the judicial bench (*ibid.*).

According to Lord Bryce (Essays, vol. 1, ch. 3), a federal Government ought to administer the army, the navy—and he would now add, the air force. It must also control posts and telegraphs, customs, which must be uniform, and have sufficient command of finance to make such control effective.

It is also most desirable that there should be a common coinage and common system of weights and measures. The federal Government should also be free to legislate for and deal with railway communications, industrial unrest—where the same is not confined to one state—immigration, and nationality.

Police, prison management, education, poor law, and other matters of a local character may advantageously be relegated to the States (*ibid.*).

Constitutional law.—Constitutional law, according to Austin, consists in the rules of positive morality, or the compound of positive morality and positive law, which fixes the constitution or structure of a given supreme government (Jurisprudence, Lecture VI.). Professor Dicey substantially adopts this definition, substituting the happy phrase "the conventions of the Constitution" for the Austinian "positive morality." He concisely defines constitutional law as that body of rules which relates to the exercise and distribution of sovereign power in a State.

Professor Holland approaches the question from a somewhat different standpoint. He divides the realm of law into public and private, and attributes this classification to the Romans, who define public law as follows: *Ad statum Rei Romanæ*

spectat, in sacris, in sacerdotibus, et magistratibus consistit. Public law, according to that learned writer, that is to say, "the law between the State and the subject," may be divided into six heads, viz.: 1. Constitutional law; 2. Administrative law; 3. Criminal law; 4. Criminal procedure; 5. The law of the State in its quasi-private personality; 6. The procedure relating to the State, so considered. It is obvious that the line of demarcation between these different heads must be drawn more or less arbitrarily, according to the opinion and convenience of the writer who is dealing with them. We may take as an example offences against the State as such, *e.g.*, treason and sedition. They are a part of criminal law, but the punishments awarded for them are among the sanctions of constitutional law.

Administrative law.—Again, the line between constitutional law and administrative law is a hazy one. By administrative law is meant the body of rules which govern the exercise of executive functions by the officers to whom they are entrusted by the Constitution. But it is usually confined to the action of individual departments of the executive, including those local bodies to whom certain public functions are delegated. It does not extend to action on behalf of the sovereign body as a whole. For instance, treaties according to English law are made by the executive, but the rules regulating the treaty-making power belong to constitutional rather than to administrative law. On the other hand, the relations between the Ministry of Health and local administrative bodies, such as county councils or boards of guardians, are a branch of administrative law. Administrative law is, in effect, a subordinate branch of constitutional law, and any line of demarcation must be more or less arbitrary.

Field of constitutional law.—It follows from what has been already stated that constitutional law, in relation to the State, deals with the distribution and exercise of the functions of government, and is therefore concerned with the individual in his character as a citizen or subject. Constitutional law comprises that part of a country's laws which relates to the following topics,

amongst others :—The mode of electing the chief magistrate of the State, whether he be emperor, king, or president : his powers and prerogatives; the constitution of the legislative body : its powers and the privileges of its members; if there be two chambers, their relations *inter se*; the status of ministers and the position of the civil service which acts under them; the armed forces of the State and the liability of the citizens to be called on to serve in the army or navy; the relations of Church and State, if these be formally recognised; the relations between the central government and local bodies to whom subordinate functions of government are delegated; the relations between the mother country and its colonies or dependencies; the treaty-making powers, and the rules which regulate intercourse with other States; the persons who constitute the body of citizens, the terms on which foreigners may be admitted to its territories and the privileges which they are permitted to enjoy; the mode in which taxation may be raised and the revenues of the State may be expended; the constitution of the courts of justice and the tenure and immunities of the judges; the right to demand a jury where trial by jury exists; the limits of personal liberty, free speech, and the right of public meeting or association; the rights of the citizen to vote for elective bodies, central or local, and his liability to perform civic duties, such as serving on juries or aiding in maintaining order (cf. Dicey, 1st ed. p. 24, and Holland).

Conventions of the Constitution.—As it has already been stated, constitutional law consists partly of positive laws, cognizable and enforceable by courts of justice, and partly of customs and traditions, which Austin calls rules of positive morality and Professor Dicey calls conventions. These last are not enforceable in courts of law. So far as it consists of positive laws, it is to be found in Acts of Parliament and decisions of the law courts. The Acts of Union with Scotland and Ireland, and the Act which vacates a seat in the Commons when a member accepts an office of profit under the Crown, are instances of constitutional statutes. The decision in *Somerset's Case*, where it was held that slavery cannot exist in England, and that a slave

became a freeman as soon as he touched the English shore, established an important constitutional doctrine.

But the greater part of English constitutional law consists of conventions founded on custom, tradition, and precedent. The Ministry must resign if the Prime Minister (an officer unknown to the law) cannot command a majority in the House of Commons: but no court could enforce their resignation or restrain them from continuing to act. The conduct of a Ministry which refused to resign would be a breach of constitutional law, but it would more properly be described as unconstitutional than as illegal. The only sanctions behind the conventions consist in a sense of honour, respect for tradition, and the fear of popular resentment. Like all customary rules, the conventions of the Constitution vary in vitality. Some are of increasing vigour, some are obsolete, and some are obsolescent. No court would recognise as an Act a bill which had not received the royal assent, but it is difficult now to imagine circumstances under which the King would veto a bill which had passed both Houses. It is a constitutional rule that a peer shall not interfere in the election of a member of the House of Commons, but this is a rule which is now observed better in the letter than in the spirit. Mr. Dicey in an illuminating chapter, which should be read and re-read by every student, discusses the conventions of the Constitution, and formulates the more important of them. Among others, he refers to the rule of collective responsibility among the members of the Cabinet (a rule by no means always adhered to in the present day); the rule that a treaty should not be concluded or a war entered upon against the wishes of the legislature; the right of ministers to a statutory indemnity when, in a public emergency and for the public safety, they have acted outside the bounds of law. It may be noted that some of the conventions of the Constitution are framed like written laws; for example, the Standing Orders of the two Houses of Parliament. But their conventional character is shown by the fact that either House can at will suspend its Standing Orders.

Characteristics of the English Constitution classified.—The leading characteristics of the English Constitution are as follows:—1. Parliament is legally sovereign; 2. The Constitution

is the outgrowth of the law of the land, and not its source, as is the case where the Constitution is written; 3. The conventions of the Constitution depend on the law of the land (Dicey); 4. The English Constitution is convenient rather than symmetrical (Anson); 5. The theory and practice of the Constitution are divergent (Anson); 6. Legislature and executive are joined by a connecting chain—the Cabinet.

CHAPTER II.

PARLIAMENTARY SOVEREIGNTY.

Parliamentary sovereignty.—The expression "parliamentary sovereignty" means that the King, the House of Lords, and the House of Commons can pass, amend, or repeal laws to any extent, and that there are no fundamental laws which Parliament cannot interfere with. The enacting formula of an Act of Parliament clearly shows the corporate character of the three branches of the Legislature and their interdependence. It runs as follows:—"Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows." Since the Parliament Act, 1911, however, the enacting words of a Money Bill are somewhat different.

Parliamentary sovereignty has a positive as well as a negative aspect. In its positive aspect it means that the King, the Lords, and the Commons acting together can make, alter or repeal any law; in its negative aspect it means that there is no legislative authority which can compete with Parliament (Dicey).

Though by the Parliament Act, 1911, the veto of the Lords over Money Bills has been abolished, and as to other Bills they have only a suspensive veto, it is still true for practical purposes to say that King, Lords and Commons are the legal sovereign. For although the King and Commons have control of finance to the exclusion of the Lords, yet the Parliament Act, which produced this result, derives its authority from the King, Commons and Lords, and could be repealed by them.

In England the nominal sovereignty is in the King, the legal sovereignty is in Parliament, and the political sovereignty is in the Electorate.

"When the 'referendum' comes there will be an end to the sovereignty of Parliament" (Pollard, p. 1).

Mr. Dicey abundantly illustrates the fact of parliamentary supremacy, and the student who desires to pursue the subject

is referred to the chapter on "The Sovereignty of Parliament" contained in his classical work. He gives as illustrations the disestablishment of the Irish Church (a direct contravention of the Act of Union); the Septennial Act, whereby Parliament extended its life from three to seven years; and he also tells us that the Scotch Act of Union has been overridden. As there are no fundamental laws, there is no judicial or other authority which can declare any given Act of Parliament invalid.

It has been suggested by certain writers that there are legal limits to parliamentary sovereignty.

(1) It is said that Parliament cannot legislate against the laws of morality. But clearly that is not so. Many people hold that the Divorce Laws contravene both the Divine and the moral law, but the courts must enforce and give effect to those laws, just as they give effect to any other law.

(2) It is said that Parliament cannot legislate against international law. But this is not so. There is a strong presumption that Parliament does not intend to infringe the rules of international law, and the courts sometimes put a forced construction on a statute in order to give effect to this presumption. If an Act of Parliament contravenes any principle of international law, the only remedy is by diplomatic action on the part of any State which may be injuriously affected.

(3) It is said that a statute cannot interfere with or derogate from the Royal Prerogative. The Act of Settlement is an answer to this contention. The alleged limitation is little more than a rule of construction. Parliament presumably legislates for the subject and not for the Sovereign, and the Crown can only be bound by express words or necessary implication. The usual formula for so doing runs: "The provisions of this Act shall bind the Crown." (Cf. Craies, Statute Law, ch. 7.)

In addition to the foregoing alleged limitations to parliamentary sovereignty, certain ancient limitations deserve notice. Among these were: (1) The King; (2) The judges; (3) Resolutions of either House of Parliament (*a*).

(*a*) The word "Parliament" in old days meant a "parley," or "talk," and the expression was first applied by monastic Statutes of the thirteenth century to the post-prandial discourses of monks, when they met in the refectory, which discourses, according to the Statutes, were unedifying. After this

(1) THE KING.—Till there was a Parliament the King was absolute, and Parliament, as we understand it, did not, according to the prevailing opinion, exist till 1295. Before 1295, it may be contended that Parliament was not a representative body. There was a great Council of Tenants *in capite*, but whether tenure *in capite* up to the reign of Edward I. was, or was not, a necessary qualification for membership is open to considerable doubt (see Ilbert, Parliament, p. 11). According, however, to the Magna Charta of 1215, the King's Council was at that time an assembly of tenants *in capite* (cf. Pollard).

The Model Parliament of 1295 was, if we except the so-called Parliament of Simon de Montfort, probably the first really representative assembly. It included, besides the Earls and Barons, the Archbishops and Bishops, who were summoned by the King's writ, and each prelate, whether bishop or archbishop, was enjoined to bring with him the deans and archdeacons, one proctor for the clergy of every cathedral, and two proctors for each episcopal diocese to represent the inferior clergy. The sheriff was, moreover, to summon two knights for each shire, two citizens for each cathedral city, and two burgesses for each borough (Ilbert, Parliament, p. 13).

The estates of the realm consist of the Clergy, the Baronage, and the Commons. Though Maitland says Edward I. wanted clergy who prayed, barons who fought, and commoners who worked, he appears to be of the opinion that the Parliament of 1295 was not a typical assembly of what is understood by the estates of the realm.

It is noteworthy that there were only forty-one barons at the Model Parliament, and Professor Pollard thinks that "the receipt of a writ at that time depended on the caprice or discretion of the Crown" (*b*).

the word was used in connection with conferences between sovereigns. After a further interval the word, in England, was applied to meetings of great men to discuss grievances either with or without the King, *e.g.*, Simon de Montfort's Parliament, Henry III.'s Parliament. Lastly, Parliament denoted the body of persons assembled to confer. (See Ilbert, Parliament, p. 1.)

(*b*) Ninety-nine barons were summoned to the Parliament of 1300. To the Parliament of 1321 Edward II. summoned fifty-two barons. Pollard, p. 99.) Probably Edward I. summoned only those barons to whom he was partial.

Parliament, when summoned, soon asserted its power in various ways, *e.g.*, the establishment of impeachment in the reign of Edward III.; and in the reign of Henry VI., during the golden age of the later Plantagenets and Lancastrians, the Lords and Commons framed the Statutes, from which circumstance flowed rules of debate and procedure generally, and the King assented to Statutes in much the same fashion as at the present day.

But the King continued to legislate by ordinance. He was supposed thus to legislate on matters of trifling moment: matters of importance required, or were supposed to require, a Statute. What was trifling, however, and what was important occasioned many a serious conflict, as will hereafter appear (cf. Maitland, p. 18). A Statute was recorded on the Statute Roll, and could be revoked only by an Act of Parliament, whereas an ordinance could be revoked by the King in Council at any time (*ibid.*).

The King had two modes of legislating. When he wished the law to be promulgated to the public he made use of a proclamation, and in other cases he made use of an ordinance.

On the accession of Henry VII. there were supposed to be the following restrictions on the royal power:

No tax could be levied or law passed without consent of Parliament:

No man could be imprisoned without a legal warrant specifying his offence:

Ministers infringing the rights of the public could be sued, and could not plead, by way of defence, the royal authority:

Ministers could be impeached for high misdemeanours:

Civil and criminal cases were triable before a jury of twelve men as regards facts (Hallam, vol. 1).

Henry VIII. obtained from Parliament the right to legislate by proclamation, and the famous Statute of Proclamations was enacted which gave to such instruments the force of law. Though this Act was repealed in the first year of Edward VI., Edward VI.'s regents, Mary and Elizabeth, enforced proclamations, notwithstanding that it was agreed by the judges in the reign of Mary that no proclamation could make a new law

(Thomas, p. 8), but only confirm and ratify an ancient one (*c*).

In the reign of James I. the Commons complained of the abuse of proclamations (Langmead, p. 402), and Coke's (*d*) opinion and those of four of his colleagues were asked for, and were to the following effect:

(A.) No new offence could be created by proclamation.

(B.) The only prerogative possessed by the Crown is such as is conferred by the law of the land:

(C.) To prevent offences the King can by proclamation warn his subjects against breaches of the existing law.

This decision was disliked by James I., who wanted to prohibit by proclamation the building of new houses in London (to check the overgrowth of the capital), and the manufacture of

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(*c*) The proclamations of Mary and Elizabeth were respecting imports and also religious matters.

(*d*) Sir Edward Coke (1552—1631) was the most hard-working of English jurists, his contributions to the legal literature of the period being colossal. He was educated at Norwich Grammar School and Trinity College, Cambridge, and was called to the Bar at Lincoln's Inn in 1578. His skilful handling of the cases of Cromwell and Shelley brought him into prominence, and in 1586 he became Recorder of London. In 1592 he was appointed Solicitor-General, in 1594 Attorney-General, in 1606 Lord Chief Justice of the Common Pleas, and in 1613 Lord Chief Justice of the King's Bench. He is chiefly celebrated for obstinacy, pride, and for literary ability, but, to do him justice, he had principles, and acted on them. His celebrated dispute with Lord Ellesmere, when the latter attempted to restrain a man from enforcing a King's Bench judgment obtained by fraud, brought him into disfavour with James I. The King also sided against Coke in his dispute with Bancroft, the Primate, relative to prohibitions directed against the Courts Christian. The *Case of Commendams* lost Coke his position. He refused to allow Bishop Neale to hold livings in conjunction with his See, and this James I. considered to be an attack on his prerogative. The other Judges agreed with Coke, but, when summoned before James and the Council, relented. Coke remained obdurate, and was dismissed a few weeks afterwards (Langmead, p. 414). Maitland says that four "P's" ruined Coke, namely, pride, prohibitions, præmunire, and prerogative. Coke was the author of the celebrated Institutes bearing his name, in which were incorporated Littleton's Treatise on Tenure. He was also the author of eleven volumes of reports and the reputed author of two more such volumes. These reports disclose a remarkable knowledge of the Year Books, which were reports of legal cases containing arguments of counsel and judgments in almost unbroken succession from the reign of Edward I. to that of Henry VIII. Littleton was a judge in Edward IV.'s reign, and the chief cause of his name being handed down to posterity was the treatise above mentioned.

starch from wheat (so as to preserve wheat for human consumption) (Langmead, p. 404).

The decision of Coke had little effect, and time-serving judges continued to uphold proclamations, disobedience to which in the reign of Charles I. was punished in the Star Chamber.

The last instance occurred during Chatham's Ministry, when, owing to bad harvests, exportation of wheat was prohibited; but on this occasion the Ministers of the Crown were covered by an Act of Indemnity. George V., during the recent war, obtained a limited statutory power to legislate by proclamation. *e.g.*, the Trading with the Enemy Act (*e*).

The Suspending and Dispensing Powers.—These were great impediments to parliamentary sovereignty. By virtue of the suspending power the King claimed indefinitely to nullify the operation of any given Statute; by virtue of the dispensing power he could do away with statutory penalties in favour of any particular individual or individuals.

The later power, if not the former, was derived from the Papal practice of issuing bulls *non obstante statuto*, "any law to the contrary notwithstanding."

Henry III. first made use of the *non obstante* clause, and, in fact, exercised both powers.

The Commons in the reign of Richard II. accorded to that King the like privilege as to the Statute of Provisors, a Statute restricting the Papal power of nominating foreign clerics to English livings and dignities, but stipulated that it should not become a precedent. Henry IV. had similar indulgences from Parliament. In the reign of Henry V. the Commons prayed for a statute to expel aliens from the country, and the King granted

(*e*) Section 43 of the Customs Act, 1876, provides that the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or Order in Council. In the case of *Att-Gen* v *Brown*, [1920] 1 K B 773; Thomas, 4, it was held that the words "any other goods" denoted goods of the same class as those previously specified, and, therefore, that a proclamation purporting to prohibit the importation of an article which was not of that class, to wit, pyrogallic acid, used in photography, was *ultra vires* and invalid In this case the Government contended that the importation of pyrogallic acid, a chemical, could be prohibited by proclamation, but it was held that the prohibition of importation of all chemicals was invalid.

their petition on condition that he might dispense with the statute at his discretion.

In the reign of Henry VII. it was decided that the King could at common law dispense with *mala prohibita* but not *mala in se* (Langmead, p. 253), and, subject to this restriction, both the suspending and dispensing powers were treated as parts of the prerogative during the sixteenth and seventeenth centuries. The Stuarts used these so-called prerogatives to subvert fundamental laws, and the unscrupulous use of the suspending power cost James II. his throne. The circumstances of the case were as follows: James II. issued a proclamation that a Declaration of Indulgence in matters of religion should be read in the churches and that the bishops should distribute copies of the declaration in their dioceses. The declaration purported to suspend the operation of all laws directed against Romanists. The Primate and six bishops signed a petition that his Majesty should not insist on the declaration being read, on the ground of its being illegal and against their consciences.

This petition was printed and circulated by sympathisers, and their conduct resulted in a criminal information for libel against the bishops. They were summoned before the King and his Council and, on admitting their signatures, were committed to the Tower for seditious libel. At the trial they were acquitted by the jury, the right of the subject to petition the King, which was afterwards contained in the Bill of Rights, being admitted.

Charles II. made use of the suspending power on two occasions: (1) When he successfully suspended the operation of the Navigation Act. (2) When he unsuccessfully issued a declaration similar to that of his successor, on which occasion he prudently gave way to Parliament.

The first important case on the dispensing power occurred in the reign of Henry VII., when it was held by the judges that although a Statute forbade any man to hold the office of sheriff for over a year and expressly barred the operation of a *non obstante* clause, nevertheless the grant of a shrievalty for life if it contained such a clause would be valid. This case was approved by FitzHerbert, a judge who flourished in the reign

of Henry VIII., the author of a celebrated treatise known as "De Naturâ Brevium," and the reputed editor of Bracton's Note-book, containing numerous reports of decisions in the reign of Henry III. (who was the real editor is doubtful).

In the case of *Thomas* v. *Sorrell* (1674), Thomas, p. 7, the plaintiff claimed a large amount as a penalty for selling wine without a licence contrary to a Statute of 12 Charles II. The jury returned a special verdict that they had found a patent of 9 James I. incorporating the Vintners Company and granting them permission to sell wine without a licence, *non obstante* an Act of 7 Edw. VI. forbidding the same.

The judges decided to the following effect. That the King might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for the King's benefit (cf. Anson, vol. 1, p. 314).

In *Godden* v. *Hales* (1686), 11 St. Tr. 1165; Thomas, 8, a collusive action was brought to test the King's dispensing power. Sir Edward Hales, the defendant, was sued for that he, after being appointed colonel of a Foot Regiment, had neglected to take the oaths of supremacy and allegiance and to receive the Sacrament according to the Test Act of 25 Charles II. The defendant had been convicted under the above Act at Rochester Assizes, and the plaintiff sued him for a penalty recoverable thereunder.

The defendant pleaded a dispensation of James II. discharging him from taking the oaths and also the Sacrament. The Court held, by twelve judges, that the dispensation barred the right of action.

This decision nearly coincides with the view of Coke (see Co. Litt. 120 *a* and 3 Inst. 154 and 186).

Blackstone says that the doctrine of *non obstante*, which sets the prerogative above the law, was effectually demolished by the Bill of Rights, and "abdicated Westminster Hall when James II. abdicated the Kingdom" (Blackstone, I. 342).

This is true as to the suspending power, but there may be still perhaps left to the King not only the power to pardon far (22).

are obliged in favor of the intention to depart in some measure from the words" (Stephen's Commentaries, 3rd ed., p. 72). The proper rule is strictly to follow the Statute, and only to give weight to the intent with which it was passed when its language is ambiguous. In *Lee* v. *Bude &c. Mg. Co.* (1871), L. R. 6 C. P., at p. 576, Willes, J., a very high authority indeed, said, "Acts of Parliament are laws of the land and we do not sit as a Court of Appeal from Parliament."

Equity judges have at times shown a tendency to disregard a Statute; in fact, they look at a Statute from the standpoint of the evil it seeks to remedy, *e.g.*, the Statute of Frauds to prevent fraud prescribes (see section 4) writing as to contracts relating to sales of land and hereditaments. To prevent fraud Equity judges have held that such a contract may be enforced even though not in writing where there has been part performance (see Strahan and Kenrick on Equity, art. 99). In *Caton* v. *Caton* (1866), 1 Ch. 137, Cranworth, L.C., said: "When one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as, for instance, by taking possession of land or expending money in building or other like acts, it would be a fraud on the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act or expend money." Again, where, according to the Wills Act, a person would naturally be presumed to hold a legacy for his own benefit, yet he may be declared by a Court of Equity to be a mere trustee for a person not named in the will where the legatee was previously informed of the particular trust intended.

8. Resolutions of either House.—The two great cases as to the legal effect of a resolution of either House are *Stockdale* v. *Hansard*, 9 Ad. & El. 1, and *Bowles* v. *Att.-Gen.*, [1913] 1 Ch. 57. In *Bowles* v. *Att.-Gen.* Mr. Justice Parker held that a resolution of either House in the absence of statutory authority to that effect does not legalise the collection of a tax, or, in other words, the decision in *Stockdale* v. *Hansard* that a resolution of either House cannot alter the law of the land was upheld.

By the Provisional Collection of Taxes Act, 1913 (c. 3), temporary legal validity, to wit, four months, was given to the

Budget Resolutions so as to allow time for the Finance Act for the year, which is retrospective, to come into force.

In *Att.-Gen.* v. *Wilts United Dairies* (1921), 37 T. L. R. 884; Thomas, 27, the defendant company agreed with the Food Controller to pay 2d. per gallon of milk sold in consideration of the grant of a licence to sell milk. Several thousands of pounds became due under this contract, and the defendants declined to pay the money. The Court of Appeal held that the Food Controller by charging for his licence, even by agreement, had infringed the Bill of Rights, this being a levying of money to the use of the Crown without the sanction of Parliament. It was here contended that the Food Controller was acting under regulations authorised by the Defence of the Realm Act, but the Court was of opinion that he was acting outside his powers. In *Brocklebank* v. *The King* (1924), 40 T. L. R. 257, a similar arrangement for the payment to the Government of a bonus for licensing the sale of a ship was declared invalid.

Actual limitations to parliamentary sovereignty.—So far we have been considering the legal sovereignty of Parliament and the claims advanced from time to time by its rivals. While there are, as Mr. Dicey points out, no legal limitations on parliamentary sovereignty, it is subject to various actual limitations. He says that there is "an external limit which consists of fear of insurrection," and also an internal limit, which consists in the fact that the dispositions of Sovereigns are moulded by the times and circumstances under which they live.

But there are further actual limitations to parliamentary sovereignty :—

(A.) *The growth of the power of the Crown.*—The power of the King has by the operation of the conventions decreased, but the power of the Executive (*i.e.*, the Cabinet) has increased. Under ordinary parliamentary conditions the Cabinet now practically monopolises legislation, and a private member of the House of Commons finds it increasingly difficult to introduce bills, and in general to take independent action. Whether a system of minority Government by one of three approximately

equal parties will tend to restore this independence is a question which the future will no doubt answer (*g*).

(B.) *The Electorate.*—The electorate are the political sovereigns of the country, and in the end can enforce their will.

(C.) *Leagues for political or industrial purposes.*—Under this head fall great trusts, combinations of labour, and purely political organisations such as the party "machines" or the Primrose League.

The British Government has been very favourable to combinations of workmen and to combinations of employers, and even international combinations of workmen have been tolerated to such an extent as to tie the hands of the Government and Parliament.

(D.) *The League of Nations.*—Professor Vinogradoff has stated in a lecture delivered at Oxford that the League of Nations is a super-Parliament. Though the League does not affect the legal sovereignty of Parliament, it must be admitted that some of its operations must sway the minds of members of either House and might impede their free judgment. Having regard, however, to the immense importance of the objects which the League of Nations is intended to serve, its maintenance is well worth the sacrifice of national pride, and even independence, involved. But there can be no doubt that where the League can exercise an influence in the internal management of the affairs of a State it must prove a fetter upon *de facto* parliamentary sovereignty. Article 8 of the Covenant provides that maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety, and it also suggests restrictions upon private manufacture of munitions. Again, our Dominions can, at the sittings of the Assembly appointed by the League, if they choose to do so, oppose our interests.

(*g*) In *Osborne* v. *Amalgamated Society of Railway Servants*, [1910] A. C. 87, at p. 115, Lord Shaw said: "Parliament is summoned by the Crown to advise His Majesty freely. By the nature of the case coercion, restraint, or a money payment which is the price of voting at the bidding of others destroys that function of freedom of advice which is fundamental in the Constitution of Parliament. . . . It is no doubt true that although a party to such contract of subjection" a member is independent of his constituents.

(E.) *A free Press, which can ventilate its opinion fearlessly.* The Press was not always free. Ever since the invention of printing in the reign of Edward IV. it was considered a monopoly out of which the Crown could make a profit, and it was also dreaded as forming a possible instrument of heterodoxy. It was from the date of its birth subjected to censorship, and such censorship was continued throughout the Tudor period.

During the reign of Mary the mere possession of heretical or treasonable books was punishable under martial law. During the reign of Elizabeth no man could print either a book or paper without the licence of a bishop or the Council, and the ordinance further provided that the possession of Catholic writings involving controversy was to be punishable.

Printing was checked by the Star Chamber during the reigns of Elizabeth, James I. and Charles I. (Feilden, p. 244).

On May 23rd, 1623, the *Weekly News*, the first of English newspapers, appeared. The Long Parliament, though it abolished the Star Chamber (*h*), placed restrictions on printing.

In 1662 the first Press Licensing Act was passed and, although it remained in force only three years, was periodically renewed until 1679, when it was suspended for a time.

In 1680, in *Carr's Case*, Scroggs, C.J., said : " If you write on the subject of the Government, whether in terms of praise or censure it is not material, for no man has a right to say anything of the Government " (Langmead, p. 609). In 1685 the Press Licensing Acts were renewed for seven years, and again once

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(*h*) This Court derived its name from the fact that the King's Council sat in a room known as the " [illegible] Stellata," or Star Chamber. Henry VII. created a Court [illegible], called the Star Chamber, but though its members were [illegible] of members of the Council, still, in the main, they were so. In its civil side [illegible] the Court took cognisance of disputes between [illegible] merchants, and between [illegible] alien merchants and Englishmen; [illegible] prize; unlawful detention of vessels; maritime questions not [illegible] purview of the Admiral; suits between corporations; and appeals [illegible] plantations, as the colonies were then called. On its criminal side, [illegible] was exercised in cases of forgery, perjury, riot, maintenance, fraud, [illegible] spiracy and all misdemeanours. The tribunal could inflict any punish- [illegible] ath excepted. Defendants were examined on oath, and also had to [illegible] terrogatories, *i.e.*, questions in writing to be answered on oath (Lang- [illegible] h ed., p. 149).

in 1692 for one year, and till the end of the following session of Parliament (*Id.*, p. 609).

After this the Press was supposed to be free, but it was fettered by the imposition of stamp duties and a straining of the law of libel (*ibid.*, p. 610). Nevertheless, newspapers multiplied. The first Stamp Act was passed in Anne's reign, and in George III.'s reign stamp duty was extended to other printed matter.

In 1763, owing to the attacks on the Government made by Wilkes in the *North Briton*, proceedings were taken against that paper. By straining the law, a general warrant (*i*) was resorted to, *i.e.*, a warrant issued by a Secretary of State for the arrest of the unnamed authors of No. 45 of the *North Briton*. Under this warrant Wilkes and others were arrested.

The Court held that a general warrant to search for and seize the papers of the unnamed author, printer or publisher of a seditious libel was illegal (*Wilkes* v. *Wood* (1763), Thomas, 117, 119).

In *Leach* v. *Money* (1765), 19 St. Tr. 1001; Thomas, 116, a general warrant to search for and seize the unnamed author of a seditious libel was declared illegal by Mansfield, C.J.

In *Entick* v. *Carrington* (1765), 19 St. Tr. 1036; Thomas, 118; Broom's Const. Law, p. 555, it was held that a warrant to search for and seize the papers of the named author of a seditious libel was illegal.

As to straining the law of libel, it was held in *Almon's Case*— (1) That the publisher of a libel was criminally responsible for his servant's acts unless proved to be not privy thereto, and that exculpatory evidence not being admissible, publication by the servant was evidence of the master's guilt. (2) That it was for the judge to determine the c[illegible] of a libel, and for the jury to determine the fact of pu[illegible]d whether the libel meant what it was alleged in t[illegible]e public cri[illegible] to mean (Langmead, p. 612).

[illegible]d the jury to [illegible]turn a libel case.

These trials encountered sever[illegible] [illegible]ued by a Secretary of State [illegible]ntiated by the Star Chambe[illegible] were decided end Fox's Libel Act, 1792, enable[illegible] verdict of guilty or not guilty in [illegible]

(*i*) General warrants were warrants iss[illegible] a person or his papers and were probably [illegible] were made use of until the above cases

The French Revolution brought about a temporary reaction, but after 1832 the Press was practically free. The publicity of all proceedings, including parliamentary debates, influences Parliament and perhaps somewhat fetters its action, and although Parliament can avoid this type of control by holding its debates in secret, yet secrecy is so repugnant to English ideas that secret debates (which have been held once or twice during the recent war) are a luxury which a modern Parliament cannot frequently afford.

Subordinate law-making bodies.—Legislative powers may be delegated as well as any other sovereign powers. *Prima facie,* the Crown legislates for colonies, but very wide legislative powers have been delegated in many instances to British colonies. The powers of the Australian and Canadian Legislatures are almost as wide as those of the Imperial Parliament; but what an Act of Parliament bestows it can in theory take away; and all British courts would be bound by an Imperial Act abrogating the powers of those Legislatures. Again, partly to save parliamentary time, and partly to provide for greater flexibility, a statute often delegates to a department of government or to a local authority a power of making rules or by-laws to carry out the provisions of the Act. So, too, the power of making rules of practice and procedure is usually bestowed on courts of justice. All statutory rules and orders of general application are collected and published annually [illegible] the Stationery Office.

A [illegible] [illegible]-making body is a legislature, corporation, [illegible] company), Punishments for non-compliance are imposed by Courts [illegible] summary jurisdiction as a rule.

(*k*) This statute (the Restoration of Order in Ireland Act, 1920) is still valid as to Northern Ireland.

law it can be questioned by the Courts (*Campbell* v. *Hall* (1774), 20 St. Tr. 239; Thomas, 69). The powers of a Colonial Governor to legislate on behalf of the Crown depend on the authority delegated to him by the Crown or the British Legislature, and in the absence of proper delegation he can neither make new laws nor repeal existing ones (*Sprigg* v. *Sigcau*, [1897] App. Cas. 238, judgment pp. 247—248).

Colonial Legislatures.—These are non-sovereign law-making bodies, because they are controlled by the Imperial Parliament (which can repeal their laws) and also by the Crown (which has the power of veto). A Colonial statute is not void merely because it is repugnant to the common law. It is void (to the extent of repugnancy) where it is repugnant to an Imperial statute binding on the Colony, or to any document which it is to have the force of law under the provisions of the Colonial Laws Validity Act, 1865, s. 2.

Extra-territorial legislation (see *post*, p. 203) is, strictly speaking, *ultra vires*, but this rule is subject to exceptions (see *post*, p. 203). Colonial legislatures must obey their Constitution, and cannot legislate on topics which are not permitted thereby; and not only must the Constitution be obeyed, but also Imperial statutes binding on the colony and in certain cases statutes passed by a supreme federal legislature. A federal legislature, again, must obey its Constitution, and cannot encroach on State legislation where the Constitution forbids th be done.

A Colonial in[illegible] in determining whether [illegible] section in a Colon[illegible]

been duly complied with, e.g., that they have not been placed on the tables of both Houses for the prescribed period. In common with Orders in Council and proclamations, rules of Court sometimes govern instead of the Act creating their powers, and this occurs when from the wording of the statute an intention to that effect is clearly apparent.

Orders in Council.—These vary in validity. The King's common law legislative powers are restricted in the manner before referred to. Where a statute delegating legislative power has been repealed, the Order in Council or proclamation becomes *ultra vires* save as to past transactions (*k*) (cf. *R.* v. *Home Secretary, Ex parte O'Brien*, [1923] 2 K. B. 261). Proclamations are governed by the same rules as Orders in Council.

By-laws.—There is a cardinal distinction between a by-law and other subordinate legislation in that a by-law cannot infringe the law of the land. By-laws can be upset for the purpose of any given case, (1) When repugnant to English law, statutory or otherwise; (2) When they are expressed in uncertain language; (3) When they exceed the limits of legislative authority under which they are made; (4) When the preliminary formalities have not been complied with; (5) When they are unreasonable. By-laws of local authorities affect considerably the daily life of the man who has to obey them, as these bodies can tax him by the levying of rates and also subject him to fine and imprisonment and loss of his goods by distress.

Punishments for non-compliance are imposed by Courts of summary jurisdiction as a rule.

(*k*) This statute (the Restoration of Order in Ireland Act, 1920) is still valid as to Northern Ireland

PART II.

The Subject.

CHAPTER III.

LEGAL STATUS OF THE SUBJECT.

General equality of all persons.—The subjects of the Crown cannot be punished or deprived of their possessions except by due course of law, and all subjects, whether they be officials or non-officials, are, as a rule, liable to trial in the ordinary courts by the ordinary magistrates and in the ordinary manner.

All men (the King excepted) are, in the main, equal in the eye of the law, and this means that if they break the law they are all equally liable to punishment in the ordinary courts of justice. The maxim of the law is that the King can do no wrong, but the reason is that he acts only through and in conformity with the advice of ministers, who are personally responsible for such advice and acts. But in all well-regulated States it is impossible to place all the citizens on an absolute equality in respect of all their actions—*e.g.*, A, in discharge of a public duty, may do a particular act with impunity which B cannot do when acting in a private capacity. To begin with, there must be certain classes privileged as to official acts; and, again, there must be classes whose rights are less extensive than those of the ordinary subject. Officials must differ from ordinary citizens to a limited extent, and in England they are, in a very limited sense, deemed a privileged class, and their immunities are less extensive than those of French officials.

In France, according to Mr. Dicey, a system known as "Droit administratif" prevails, and official courts have been

established where officials are tried before an official bench for acts done in an official capacity. As there is inevitably a fellow-feeling amongst officials, this system tends at times to pervert justice. Consequently the ordinary individual frequently endeavours to get his cause heard before the ordinary courts, and the "Tribunal des Conflits," which decides whether or not a particular case is to go to an official court or the ordinary court, has considerable work to do.

In the days of the Stuarts we had something like "Droit administratif," for in cases where the rights of the subject clashed with the royal prerogative the writ "de non procedendo rege inconsulto" was often utilised to the subject's prejudice (Dicey, ch. 12) (*a*).

Public Authorities Protection Act.—By the Public Authorities Protection Act (56 & 57 Vict. c. 61) no person can sue another in respect of any official act, or in respect of any neglect or default, whilst in the execution of any statutory duty, or of any public duty, except within six months after such act, neglect, or default, or in case of a continuance of injury or damage within six months after the ceasing thereof. Furthermore, opportunity

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(*a*) It is worthy of remark that Professor Dicey, in the latest edition of his work, has modified to some extent his earlier criticisms of the French system of "Droit administratif." Doubtless he has been led to do so on account of what he calls the "judicialising" process to which this system has been subjected. In other words, it has lost its elasticity in a way analogous to that of our own system of equity, and consequently is not now characterised by that appearance of arbitrariness that seemed so much to favour the State at the expense of the individual. But even now it is undoubtedly true that at bottom the "Droit administratif" rests upon principles radically antithetical to those of our own *corpus juris*, which is permeated by the "Rule of Law" and Ministerial Responsibility.

It is hardly necessary to point out that the term "Droit administratif" finds no equivalent in English law, far less does it signify "administrative law" as described in a previous chapter of this book.

In a manner of speaking, we have faint adumbrations of such a notion even in our own system; for example, the subject cannot take legal proceedings against the Crown according to the ordinary forms of action, but must proceed by way of Petition of Right, and then only after obtaining the leave of the Attorney-General. Still, even here, there is lacking the primary characteristic of the French "Droit administratif," which, even if its principles have hardened into the technical certainty of a code, is the co-existence of State or official courts side by side with the ordinary courts.

must be given to the official of tendering amends, and when an action is commenced after tender of amends, or proceeded with after a payment into court, if the plaintiff does not recover more than the sum tendered or paid into court, he shall not recover costs incurred after such tender or payment into court. Where an action against an official is unsuccessful he can recover against the plaintiff costs on a higher scale than the ordinary individual can under similar circumstances.

Immunities of high officials.—There are other classes occupying important positions who must, for obvious reasons, have special privileges. A Viceroy, it seems, can commit certain wrongs on an individual with impunity, for which even ordinary officials could be penalised (*Luby* v. *Ld. Wodehouse*, Thomas, 91, cited and commented on in *Musgrave* v. *Pulido* (1879), 5 App. Cas. 111).

Acts of State.—The expression "act of State" is used in various senses. It is used in reference to important State documents or important executive acts. But in law it has a special meaning. Sir FitzJames Stephen defines an act of State as "an act injurious to the person or to the property of some person, who is not at the time of that act a subject of Her Majesty; which act is done by a representative of Her Majesty's authority, civil or military, and is either sanctioned or subsequently ratified by Her Majesty" (Stephen's History of Criminal Law, vol. 2, p. 61). It therefore denotes an act inflicting damage on a foreigner which would give him a remedy in our Courts, but is not cognisable by them because authorised or adopted by the Crown (cf. *Musgrave* v. *Pulido* (1879), 5 App. Cas. 111).

In *Buron* v. *Denman* (1859), 2 Exch. Rep. 167; Thomas, 132, the defendant, a naval captain, made a treaty with the chief of an uncivilised country for the abolition of the slave trade without the authority of the Crown, and then, in pursuance of the treaty, committed acts of aggression on the plaintiff's property. The court held that the subsequent ratification by the Crown of an unauthorised treaty made what would otherwise have been illegal an act of State, and that consequently no right of action lay.

See, further, *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A.; and Fraser on Torts, pp. 13—17.

Judicial immunities.—Where a judge acts either without jurisdiction or in excess of jurisdiction, a civil action lies at the suit of the person injured (*Houlden* v. *Smith* (1850), 14 Q. B. D. 850; Thomas, 149). But if the judge had no means of knowing that he lacked jurisdiction, *aliter* (*Calder* v. *Halkett*, 3 Moo. P. C. 28; Thomas, 150); and where, whilst acting within his jurisdiction, he makes a mistake, he is not civilly responsible (*Kemp* v. *Neville* (1861), 10 C. B. N. S. 523); and it has even been held that where a judge acts maliciously whilst within his jurisdiction, he is not civilly responsible (*Anderson* v. *Gorrie*, [1895] 1 Q. B. 670, C. A.; Thomas, 147). The editor of the fifth edition of Thomas's Leading Cases in Constitutional Law thinks that possibly a county court judge is protected by section 55 of the County Courts Act, 1888, as regards what is done under a warrant bearing the seal of the Court (Thomas, p. 49).

The reason for this immunity, as Lord Esher points out, is that otherwise judges would lose their independence, and that the absolute freedom and independence of the judges is essential to the due administration of justice (*Anderson* v. *Gorrie*, *supra*) (*b*).

The rule in England is that judges hold office during good behaviour and are not dependent on the will of the Executive. If a judge of the Supreme Court is guilty of gross misconduct he may be removed by the Crown on an address moved by both Houses of Parliament (*c*). Judges of inferior courts are, as a

(*b*) The late Mr. Justice FitzJames Stephen, in his Digest on Criminal Law, mentions a crime called "oppression," for which a punishment is prescribed against judges who act oppressively; but this offence is now, perhaps, obsolete.

(*c*) In spite of the Act of Settlement, under which the judges hold office "*quamdiu se bene gesserint*," it was determined on Anne's succession that the judges had to vacate their offices on the demise of the Crown (2 Ld. Raym. 768, and Annual Practice, notes to section 5 of the Judicature Act, 1875). By 6 Anne, c. 7, judges were to remain in office for six months after the death of the King, and now, by the Demise of the Crown Act, 1901, they are unaffected by the event. According to the Commons Journal, the judges of the great Courts of common law never sat in the Commons, but until 1840 (3 & 4 Vict. c. 66) the Admiralty judges could sit there. As to judicial posts created subsequent to 1840, the Act creating the office disqualified its holders from sitting in the Commons. The Judicature Acts disqualified the Master of the Rolls.

There is reason for believing that the judges originally sat and voted in the House of Lords, but either in the reign of Edward III. or his successor they were only summoned, as they now are, to treat and give counsel, a privilege

rule, removable by the Lord Chancellor for incompetence or misconduct: see, *e.g.*, County Courts Act, 1888, s. 15; Coroners Act, 1887, s. 8. In the case of other judges, as, for instance, recorders, the power of removal is somewhat obscure, but probably can be exercised by the Crown. Magistrates are removed by the Lord Chancellor by striking their names out of the commission of the peace.

Inferior courts are also controlled and kept within the bounds of their jurisdiction, even where no appeal lies, by the writs of mandamus, procedendo, certiorari, and prohibition, issued by the High Court as the successor of the old Court of King's Bench (*d*).

Official immunities.—Certain high officials are not civilly liable for the acts of their subordinates as ordinary persons would be: thus, in the case of *Lane* v. *Cotton* (1700), Salk. 17; Thomas, 74, the Postmaster-General was not deemed, as an ordinary employer of labour would have been, legally responsible for the acts of employés who had, under circumstances of carelessness, lost some valuable exchequer bills. Where, however, a public official is personally guilty of breach of a legal duty, he incurs civil liability in the event of an action, as a rule (*Henley* v. *Mayor of Lyme* (1828), 5 Bing. 17).

In general, an agent who exceeds his authority is personally liable, but when the agent happens to be a colonial governor the

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shared by the Attorney- and Solicitor-General and the King's Serjeant. They formerly had to sit on the Woolsack in the Lords during session, but now they are only summoned by a special order (*ibid.*).

The conduct of the High Court judges must not, by a convention of the Constitution, be reflected on in Parliament by a question, or by way of amendment, or in debate, unless the discussion is based on a substantive motion in proper terms—see Law Journal, June 2, 1906.

(*d*) Words uttered by a judge in court during the hearing of a case cannot form the groundwork of an action for slander (see *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668; Thomas, 147; *Fray* v. *Blackburn* (1863), 3 Best & Sm. 576). A contrary opinion, which is probably not now law, was held in *Kendillon* v. *Maltby* (1842), Car. & M. pp. 402, 409, where Lord Denman stated to the effect that all judges of superior and inferior Courts were liable in damages for slanderous words, either not relevant or uttered when a case was finished; and in *Thomas* v. *Churton* (1862), 2 Best & Sm. 479) Cockburn, C.J., doubted whether slanderous words uttered on the Bench maliciously and without reasonable and probable cause were not actionable.

rule is different. Thus, in an old case where the Governor of Quebec contracted with a tradesman in his capacity of governor for the purchase of certain commodities, and the Treasury, deeming his conduct imprudent, disallowed a considerable portion of the price, he (the governor) was not held civilly responsible for the excess (*Macbeath* v. *Haldimand* (1786), 1 T. R. 172; Thomas, 72; see also *Dunn* v. *MacDonald*, [1897] 1 Q. B. 555). The last-named case also decides that a public servant purporting to contract on behalf of the Crown and wanting authority to make such contract is not liable to an action for breach of warranty of authority. Where, however, a civil servant expressly renders himself personally liable under a contract an action will lie against him if such contract is broken (*Graham* v. *Public Works Commissioners*, [1900] 2 K. B. 781) (*e*).

Where a civil servant is allowed to choose, and does choose, incompetent subordinates he is immune from liability (*Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 124—*per* Lord Wensleydale).

A public official is not responsible where he enforces in a regular and reasonable manner any sentence or legal process, provided that he acts under an order or warrant purporting to be regular on the face of it, and that it is his duty to obey such order or warrant (*Lord Mayor of London* v. *Cox* (1867), 2 H. L. Cas. 269) (*f*).

Members of both Houses of Parliament possess certain immunities (see *post*), and so do clergymen.

Officials "inter se."—Where government officials deal with subordinates a considerable amount of latitude is allowed in certain cases, and they can go scot free from liability in respect of actions which would subject others to severe legal penalties. In the case of *Sutton* v. *Johnstone* (1787), Bro. P. C. 76; Thomas, 127, the plaintiff was arrested at the instance of the defendant and detained in custody for a considerable time, and though he was

(*e*) The point is a somewhat doubtful one—see judgment of Phillimore, J., in above case.

(*f*) A public officer who acts under a warrant issued by a magistrate is exempted from civil liability by 24 Geo. II. c. 44, s. 6, on production of a copy of his warrant six days after demand being made for same. See Fraser on Torts, p. 18.

ultimately acquitted by a court-martial, which exonerated him from all blame, it was held that no action lay against the defendant. Again, in the case of *Dawkins* v. *Lord Paulet* (1869), L. R. 5 Q. B. 94, it was held that no action lay in respect of what would otherwise have been libellous statements contained in a report made by a superior officer against his subordinate. See also *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744; Thomas, 128; also cases collected in Fraser on Torts, p. 112.

In the case, however, of *Warden* v. *Bailey* (1811), 4 Taunt. 67, it was held that an action for damages lay where a man was imprisoned because he disobeyed an order made by a military superior, which that military superior had no jurisdiction to make (*g*).

Immunities of Trade Unions.—Two Acts have been passed exempting trade unions from criminal and civil liability to which ordinary persons are subject. As to criminal liability, "an agreement or combination by two or more persons to do or procure to be done any act in furtherance of a trade dispute shall not be indictable as a conspiracy if such act when committed by one person would not be criminally punishable" (Conspiracy and Protection of Property Act, 1875, s. 3). Nothing in the Conspiracy and Protection of Property Act is to affect the common law as to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the King or the State (section 3). The word "crime" for the purposes of the Act is to include summary offences.

By the Trades Disputes Act, 1906 (c. 47), any act done in pursuance of an agreement or combination by two or more shall, if done in contemplation of a trade dispute, not be actionable in a civil court unless the act complained of, if done without such agreement or combination, would be civilly actionable.

By section 3 of the Trades Disputes Act, 1906, any act done in contemplation or furtherance of a trade dispute is not to be

(*g*) Magistrates and others who act without jurisdiction, or in excess of jurisdiction, are liable to actions for damages. Accordingly, members of a court martial who pass a sentence they have no power to pass are all civilly liable (Manual of Military Law, ch. 8.)

actionable by reason only that it induces any person to break a contract of employment or interferes with any person's liberty to dispose of his labour or capital as he wills, and by section 4 actions of tort against trade unions, whether of workmen or masters, are prohibited.

Persons who labour under legal disadvantages.—We will now turn to those classes whose position in the social community brings them under special laws, or exposes them to certain disadvantages. Examples of these are :—

(A.) Those belonging to certain callings, *e.g.*, the Army, the Navy, the Church. Soldiers and sailors are subject to military law, and clergymen are subject to the discipline of the ecclesiastical courts, and also to restrictions in trading.

(B.) Those who, owing to previous convictions, must of necessity be placed under certain restrictions.

(C.) Paupers, who are subject to certain electoral and other disabilities.

(D.) Aliens. (An alien is any person who is not a British subject.)

(E.) Bankrupts, who are ineligible for certain public offices and franchise.

(F.) Outlaws.

The legal disadvantages of persons exercising particular callings need no comment here; but where persons have been previously convicted, they may be rendered liable to imprisonment in respect of conduct which would be readily explainable in the case of the ordinary citizen; *e.g.*, being found on someone else's premises without being able to give a satisfactory account of themselves. (Prevention of Crimes Act, 1871, s. 7.)

For the protection of society it is often necessary to punish conduct which is merely suspicious. By 5 Geo. IV. c. 83, s. 4, every person wandering abroad, and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, &c., not having any visible means of subsistence, and not giving a good account of himself, may be punished as a rogue and a vagabond.

The section further provides that every suspected person or

reputed thief frequenting any river, &c., or any place of public resort, &c., or any street or highway, &c., with intent to commit a felony, may be punished as a rogue and a vagabond. In proving the intent to commit a felony, it is not necessary to prove any act tending to show the purpose, but the prisoner may be convicted if, from the circumstances of the case and his known character, it appear that he contemplated a felony. There must be evidence that the prisoner was there more than once (*R.* v. *Clarke*, Metropolitan Police Guide).

Aliens.—By the common law aliens could not hold land or fill public offices or possess civic rights (Langmead, 7th ed., p. 533). Magna Charta (Art. 41) provided that all merchants should have liberty to enter, dwell, and travel in and to depart from England for purposes of commerce without being subject to any evil tolls but only to the ancient and allowed customs, except in time of war. On the breaking out of war merchants of the hostile States shall be attached, if in England, without damage to body or goods until it be known how our merchants are treated in such hostile State, and if ours be safe, the others shall be safe also. In the first re-issue of Henry III.'s charter the words "nisi publice antea prohibiti fuerint" were added after the opening words "Omnes Mercatores" (Langmead, 7th ed., p. 108) (*h*).

By 32 Henry VIII. c. 16, aliens could neither rent a shop nor a residence, but the statute was silent as to pre-existing restrictions. Higher taxation was imposed on aliens. At common law they could be expelled at the royal pleasure, this prerogative right being last exercised in 1575.

An alien could always be made a denizen by royal prerogative,

(*h*) Jews in Norman and Plantagenet times were counted as aliens with the exception that their position was not so secure.

The Norman Kings utilised the Jews to feed upon the people so that the King in his turn might feed upon them, which he did by tallages. In the reign of Henry II. the Jews must have been profitable to the King, for we hear of the "Scaccarium Judaismi," supervised at first by Jewish but afterwards by Christian judges. Magna Charta (article 10) provided that debts due to Jews were to bear no interest during the minority of the heir. In 1290 Edward I. banished the Jews, but Cromwell allowed them to visit England, and they were allowed to settle in England in the reign of Charles II. (Langmead).

or a British subject by a private Act. 7 James I. c. 2 provided that no alien should be naturalised until he took the Sacrament according to the rites of the Church of England, and the oaths of supremacy and allegiance in the presence of Parliament. These restrictions were avoided by private Acts. In 1708 an Act, 7 Anne c. 5, which only lasted three years, was passed which provided that all foreign Protestants could be naturalised (*i*).

During the wars with France in the eighteenth and nineteenth centuries aliens were placed for a time under severe restrictions, but these gradually disappeared after Waterloo.

In 1844 aliens obtained certain advantages under Hutts' Act, which enabled them (*inter alia*) to be naturalised under a certificate of the Home Secretary on taking the oath of allegiance, but they could not become members of Parliament or of the Privy Council, neither could they enjoy rights excepted by the certificate. (As to subsequent Acts affecting naturalisation and alienage, see *post*, Ch. IX).

In *Speyer's Case* (*R.* v. *Speyer*, [1916] 2 K. B. 858, C. A.) it was held that a naturalised alien could be a member of the Privy Council. Proceedings in the nature of a writ of *quo warranto* were instituted to determine the legality of Sir Edgar Speyer's appointment as a Privy Councillor, and the statutes relative to the claim were as follows : The Act of Settlement (section 3) provided that nobody born abroad or outside the British Dominions, though "*naturalised or*" a denizen, except born of English parents, should be eligible for (*inter alia*) the Privy Council. By section 7 of the Naturalisation Act, 1870, persons duly naturalised thereunder were to be entitled to all political and other rights of a British subject. By section 3 of the Naturalisation Act, 1914, holders of a certificate of naturalisation in the United Kingdom were to have all political and other rights appertaining to a natural-born British subject, and it was further provided that section 3 of the Act of Settlement, as regarded naturalised subjects, should be read as if the words "*naturalised or*" were omitted therefrom. The Court held that the Act of

(*i*) In 1753 an Act was passed permitting the naturalisation of Jews without taking the Sacrament.

1870 had repealed by implication section 3 of the Act of Settlement as regarded naturalised subjects, and that as the Act of 1914 had not revived the disqualification the appointment of Sir Edgar Speyer was valid.

So long as the State to which he belongs is at peace with His Majesty, an alien in England enjoys full civil, as opposed to civic, rights. He owes temporary allegiance, and as he is subject to our laws, he enjoys their protection, *e.g.*, he can bring and defend actions and institute prosecutions. He can acquire land, has full personal liberty, and can generally do as he pleases; but though he must pay taxes when domiciled in England, he cannot exercise either the parliamentary or municipal franchise; neither can he own a British ship or any share therein. In *R.* v. *Arnand* (1846), 19 Q. B. D. 806, it was held that a company which had been registered in this country could own a British ship although all its members were aliens.

Undesirable aliens.—The immigration into this country of criminal and necessitous aliens gave rise, some years ago, to restrictive legislation. The Aliens Act of 1905 provides that an alien who is classed under the Act as "undesirable" may, under certain conditions, be prevented from landing, and the following are denominated undesirable aliens :—

1. Those who (not being political or religious refugees) cannot show that they have in their possession, or that they are in a position to obtain, the means of supporting themselves and their dependants.
2. Lunatic or idiot aliens, or those suffering from any disease or infirmity by which they may become a burden to the public.
3. Those who have been sentenced for an extraditable offence in a foreign country.
4. Those against whom an expulsion order has been made.

Under the regulations of the Secretary of State, the Act at present is only directed against the importation in bulk of undesirable aliens. Ships which bring more than twenty alien steerage passengers can only land them at certain named ports. Before landing the immigrants are inspected by the immigration officer, who rejects those who appear to be undesirables, subject

to appeal to an Immigration Board appointed by the Home Secretary.

The Act further provides for the expulsion of aliens who abuse our hospitality, and the following are liable to expulsion :—

(A.) Aliens who have been convicted of felony, misdemeanour, or any other offence punishable with imprisonment without the option of fine, and disorderly prostitutes, provided that the convicting court recommends them for expulsion, and that the Home Secretary confirms the recommendation.

(B.) Where it has been certified to a Secretary of State by a magistrate after proceedings taken for the purpose within twelve months after the alien has last entered the United Kingdom that such alien has—

α. Been in receipt of such parochial relief as would, if he were a natural-born subject, disqualify him for the parliamentary franchise.

β. That he has been living under insanitary conditions, or wandering without visible means of support.

γ. That an alien has entered the United Kingdom after the passing of the Act, having been sentenced in a foreign country in respect of an offence for which he could be extradited.

Provision is made by the Act for the detention in custody of undesirable aliens till the Secretary of State has made an order concerning them, and afterwards till their embarkation.

During the late war the following restrictions were imposed on aliens generally. By the Aliens Restriction Act, 1914, his Majesty was empowered in case of war or any national emergency to make orders—(a) prohibiting or restricting the landing of aliens in the United Kingdom, (b) for the departure of aliens from the United Kingdom, (c) for deportation of aliens, (d) to prescribe for aliens' residence within certain areas, (e) for registration of aliens, (f) for appointment of officials to supervise movements of aliens, (g) for imposition of penalties for non-compliance with orders, (h) for the arrest, detention, and searching of premises of aliens. Provision is also made for the summary punishment of persons offending against the Act. By the Aliens Restriction

Continuance Act, 1919 (c. 92), certain emergency powers were to be continuable as to aliens, and by section 8 of the Act any alien who either attempts to do or does any act calculated or likely to cause sedition or disaffection amongst any of his Majesty's Forces or the forces of his Allies or amongst the civilian population shall be liable to penal servitude up to ten years, or to imprisonment on summary conviction up to three months.

A penalty of up to three months' imprisonment is imposed where an alien promotes or attempts to promote industrial unrest in any industry in which he has not been *bona fide* engaged within two years prior to the summary proceedings being instituted against him.

The Act also prohibits an alien, subject to certain exceptions, from holding a pilotage certificate, or acting as master or chief officer of a merchant ship, or as skipper or second hand of a fishing boat.

Restrictions are also placed on aliens changing their names. Where, again, an alien sits on a jury, as he is liable to be called upon to do after ten years' residence in this country, any party to the proceedings may challenge him and so get him removed from the panel.

The Crown has, by its prerogative, right to detain an alien enemy during time of war.

During the war there were numerous decisions respecting aliens, their internment and deportation. In *R.* v. *Knockaloe Camp Commandant, Ex parte Forman* (1917), 34 T. L. R. 4, the Court held that the King by virtue of his prerogative could intern alien enemies, whether they be registered under the Aliens Restriction Act or not. In *Ex parte Sarno* (1916), 115 L. T. R. 608, Lord Reading, alluding to the powers under the Aliens Restriction Act, 1914, during war or emergency, stated that its object was to confer on the Secretary of State extraordinary powers of dealing with aliens, and it permitted sweeping regulations, but doubt was expressed as to whether the Executive or the alien had the right to choose the country to which the alien is to go. The use of the power of deportation as an act of comity to allies is exemplified in *Ex parte Duc de Chateau-Thierry*, [1917] 1 K. B. 922. In this case the French demanded the sur-

render of the Duke of Chateau-Thierry, who had resided in England for some years prior to the war. The Duke contended that he was a political refugee, and also that he was unfit for military service. Here the Court confirmed the order for deportation, and held also that the Government could choose a ship and place the Duke on board (*per contra*, cf. *Ex parte Sarno*, *supra*).

In *Sacksteder's Case* (1918), 118 L. T. 165, the applicant, who expressed his desire to enlist in the British Army, and failing to do so was ordered to be deported, the Court confirmed the order. The circumstances relating to the arrest of Sacksteder were peculiar. The Home Secretary had left general directions for the arrest of certain aliens under the Aliens Restriction Act, and the arrest of Sacksteder was carried out by the directions of the Home Secretary. He had previously given general directions that persons named in a deportation order were to be put on certain ships and detained in custody until they sailed. The Assistant Secretary instructed the police to arrest Sacksteder. On the hearing of a *habeas corpus* application the Court held (1) that Sacksteder was in legal custody; (2) that orders for deportation should be signed by the Home Secretary; (3) that the Court can go behind an order for arrest though it be valid on its face. In *Venikoff's Case*, [1920] 3 K. B. 72, it was held that an alien could be deported under the Act of 1914 without a preliminary enquiry into the circumstances of the case, an order of deportation being an executive and not a judicial act. The Aliens Restriction Act is a permanent Act conferring summary powers operating during time of war or other great emergency as to aliens; or, in other words, it contains clauses for coping with war and also sudden disorders.

Alien enemies.—An alien enemy is a person who voluntarily resides or carries on business in enemy territory. Thus an Englishman resident during the Great War in Germany was an enemy alien *quoad* this country. Local and not natural allegiance furnishes the test. But during the recent war an extended meaning was given to the term; at any rate, for trading purposes. Under the Trading with the Enemy Act, 1915 (c. 98), enemy

nationals and other persons having hostile associations may be treated as enemies though not residing in hostile territory.

As a general rule, except under licence from the Crown, an alien enemy cannot sue or initiate any proceeding in a British court. He may be sued, and therefore may appeal. If a cause of action has accrued to him before war, it is only suspended till peace comes, but no right of action can accrue to him during war.

When war is declared by this country the declaration operates as if it were an Act of Parliament prohibiting all intercourse with the enemy except under licence from the Crown. In the case of contracts made with an enemy before war, the contract is dissolved if the fulfilment of its conditions would involve any intercourse or dealings with the enemy during war.

For leading cases, see *Driefontein Consolidated Mines* v. *Janson* [1902] A. C. 384 (enemy status); *Porter* v. *Freudenberg* [1915] 1 K. B. 857 (legal proceedings); *Ertel Bieber & Co.* v. *Rio Tinto Co.* [1908] A. C. 260 (trading with enemy).

Under the Aliens Act of 1919 (*supra*) ex-enemy aliens are to be deported unless the Secretary of State, on the recommendation of a proper advisory committee, permits them to remain.

Until after the expiration of three years from the passing of that Act ex-enemy aliens are prohibited from acquiring land in the United Kingdom, having any interest in a key industry, or a share in a British ship.

Lastly, the Act repealed the Aliens Act, 1905, from such dates as might be specified by Order in Council, and such order was allowed to repeal any of its provisions on different dates, and, on the other hand, could incorporate any of the provisions of the repealed Act.

Women.—Before 1918 it was roughly true to say that women, while possessing full civil rights, had no civic or political rights beyond the municipal franchise and the capacity to hold certain local offices.

Since then two statutes have greatly enlarged their political status. By virtue of the Representation of the People Act, 1918 (as to the detailed provisions of which see pp. 336 *et seq.*), and the Sex Disqualification Removal Act, 1919 (c. 7), a woman can

now (1) vote, subject to certain restrictions, at Parliamentary elections and sit in the House of Commons; (2) vote at almost all local elections and hold nearly every office; (3) be a magistrate; (4) exercise any public function or be appointed to any civil or judicial office; (5) serve, and be required in certain instances to serve, as a juror; (6) be admitted to any incorporated society (*e.g.*, the Inns of Court) and subject to rules, to the civil service; (7) be admitted as a solicitor upon three years' service under articles, provided she has taken the qualifying university degree required of a man, or has qualified for such degree at any university not admitting women to degrees. Power is given to universities to admit women to membership or to any degree.

A peeress in her own right, however, cannot sit in the House of Lords, notwithstanding they were occasionally allowed to do so in early times (*Lady Rhondda's Case*, [1922] 2 A. C. 339).

CHAPTER IV.

THE LIBERTY OF THE SUBJECT.

Personal freedom of the subject.—Dicey opens his classical treatment of this subject by calling attention to a significant fact. The written Belgian Constitution, he points out, contains clauses guaranteeing to the subject freedom of the person, of discussion, of the Press, and so forth : and with these abstract declarations he contrasts the means by which our own Constitution secures the same rights. Under our Constitution liberty does not need to invoke the authority of any formal written enactment. First, every man is free to do what he will except in so far as the law otherwise provides. Secondly, this freedom is enforced, not by general declarations of rights, which are often ineffectual in practice, but by concrete remedies—writs, the issue of which the aggrieved party can compel, and thereby bring his oppressor to book. It is true that Magna Charta and other great constitutional treaties proclaim abstract rights, but in so doing they were merely declaratory of the existing common law.

Again, the French Constitution, while purporting to guarantee "liberty" in various forms, contains a provision enabling the Executive to declare a "state of siege," and when a state of siege is declared the executive can disregard the ordinary law altogether. It is obvious how valueless any declaration of abstract liberty becomes to the subject in face of such an overriding power; and how much more effectively freedom is safeguarded by our own law, which knows no such thing as a state of siege—at least in time of peace (as to this see *infra*, Chapter VII.).

Redress of subject when deprived of liberty.—On wrongful deprivation of liberty, the following remedies are open to the citizen or the alien, viz. :—

1. The taking of civil proceedings for damages either in respect of malicious prosecution or false imprisonment or assault;

2. A criminal prosecution for assault, battery, or even in respect of false imprisonment itself (*a*).

3. In certain cases a summons can be taken out before a magistrate, under the Summary Jurisdiction Act, to recover costs incidental to defending irregular and unjustifiable proceedings.

4. The suing out a writ of *habeas corpus* to obtain one's release.

5. The issue in certain exceptional instances of a writ of certiorari or prohibition (*b*).

6. Appealing from the verdict of a jury to the Court of Criminal Appeal under the new Criminal Appeal Act, or from magistrates to quarter sessions.

The question of bail has long occupied the attention of the Legislature. The Bill of Rights provides that bail be not excessive, but leaves the fixing of the amount to the judicial officer. Magistrates may possibly now be able to refuse bail for any misdemeanour (see Costs in Criminal Cases Act, 1908), but they could not formerly refuse bail unless the prosecution costs were defrayed out of local funds.

Where a magistrate has a discretion as to the granting of bail he can fix it at any amount he chooses, but an appeal lies to a High Court judge sitting in chambers. Bail can be procured in a proper case where a prisoner is appealing against imprisonment awarded by a court of summary jurisdiction; and by the Criminal Justice Administration Act, 1914, the justice who has issued a warrant for the arrest of a prisoner can endorse on the back thereof the amount of bail a superintendent of police may accept. The judge can grant bail during a criminal trial before a jury, and even after a trial where the prisoner intends to appeal. Coroners can grant bail and also sheriffs, though the jurisdiction

(*a*) See Archbold's Criminal Pleading, p. 89.

(*b*) Statutory provision has also been made for obtaining one's liberty when sentenced to imprisonment by a magistrate for a summary offence, whereby release is obtained pending appeal, if one tenders recognizances or proper bail.

Power has also been given for the Metropolitan Police to discharge from custody on bail or on recognizances persons arrested for trifling misdemeanours when twenty-four hours must elapse before such persons can be brought before a magistrate. (10 Geo. IV. c. 44.)

(*c*) The subject is ably discussed in Kenny's Outlines of Criminal Law.

of the latter now devolves on justices of the peace save as to certain Revenue actions.

Bail can be given in cases of penalties due to the Crown, and which are now dealt with on the Revenue side of the King's Bench Division. Actions for penalties due in respect of customs are even now commenced by arresting the prisoner under a writ of *capias*, after which, to secure his liberty, he must obtain bail or give security.

Redress for false imprisonment and malicious prosecution.—As to redress for false imprisonment and malicious prosecution, the damages which are awarded may be vindictive, *i.e.*, the jury are permitted to mark their disapprobation of defendant's conduct by awarding damages which will punish and not merely compensate. No damages, however, can be recovered unless it can be shown that the defendant has acted maliciously, and without reasonable and probable cause.

It is a generally accepted opinion that where a man puts in motion the criminal law against another man the accused must be acquitted before he can sue for damages; it may be noted that where a statute provides a particular method of arrest, and an irregular arrest has been made in violation of the statute, the accused can recover damages (*Justice* v. *Gosling* (1852), 12 C. B. 39).

Arrest.—The general rule is that no man can be arrested or imprisoned except under due process of law. Where a person is suspected of serious crime, the usual course is to apply to a magistrate for a warrant for his arrest. That warrant can only be granted on a sworn information. In minor cases a summons is usually applied for, and if the person summoned does not appear a warrant can then be issued. But there are many cases where a person can be arrested without warrant, especially by a peace officer.

A constable may arrest where he has reasonable suspicion that his prisoner has committed felony, but a private person cannot do so unless he can show by way of defence that a felony has been in point of fact committed, or unless he does the act when called upon to assist the constable, or perhaps a justice of the

peace; or there has been a hue and cry (a general chase of a suspected person) (*d*).

The writ of habeas corpus and kindred writs at common law.—Prior to the Habeas Corpus Act there were various old writs designed to secure personal liberty to the subject under certain circumstances.

1. The writ of mainprize, whereby the sheriff was directed to take sureties for the appearance of a prisoner on a given occasion, and subject to such sureties (mainpernors) being forthcoming to set him temporarily at liberty (Blackstone, 21st ed., vol. 3, p. 121).

2. The writ *de odio et atiâ*, bidding the sheriff to hold an inquiry whether a prisoner accused of murder was committed on reasonable grounds for suspecting guilt or *propter odium et atiam*, and, if the sheriff found that prisoner was committed *propter odium et atiam*, to admit him to bail (*id.*, p. 128).

3. The writ *de homine replegiando*, directing the sheriff to replevy, *i.e.*, release, a person just as goods were and are repleviable in the action of replevin; sureties bound themselves before the sheriff that prisoner should appear and answer the charge against him.

4. The following *habeas corpus* writs were designed to secure temporary liberty, and for other purposes.

(*d*) Where an affray or breach of the peace accompanied by violence has been committed, any person present may interfere to part the combatants, and onlookers may hold a combatant till the temper of that combatant cools down, and they may also detain the combatants and afterwards hand them over to a constable at the first convenient opportunity. A mere threat to fight will not justify interference, for till it actually begins no arrest can take place, either by a constable or anyone else.

A person attempting to commit a felony may be arrested by a private person present at the time, and a policeman may arrest to prevent a breach of the peace, and on all occasions where a breach of the peace has been committed before him.

Where an indictable offence has been committed between 9 p.m. and 6 a.m., it appears that any person can arrest (14 & 15 Vict. c. 19, s. 11). Again, where an offence is committed directly against a person, a power to arrest is in many cases given to that person, and also to his servants. A magistrate may either arrest or order the arrest of a person committing a breach of the peace in his presence (Metropolitan Police Guide, 4th ed., p. 397).

There are also many statutes giving a power of arrest for particular offences either to constables or the public generally, or to specified persons.

(A) *Habeas corpus ad respondendum*, to bring up a prisoner in the custody of an inferior court to charge him with a fresh action in the superior court.

(B) *Habeas corpus ad satisfaciendum*, to bring up a prisoner against whom an adverse judgment had been obtained in an inferior court (*id.*, p. 129).

(C) *Habeas corpus ad recipiendum*, alias *habeas corpus cum causâ*, to bring up a defendant already in custody in an inferior court to do and receive what the King's Court shall deliver in that behalf (*ibid.*).

(D) *Habeas corpus ad subjiciendum*, directed to the person who had the prisoner in custody, commanding such person to produce the prisoner in court with the day and cause of detention, *ad faciendum subjiciendum et recipiendum*, whatever the court should ordain in that behalf. This was the writ which was improved upon by the Habeas Corpus Acts.

At common law there was a writ of *habeas corpus cum causâ*. Where a prisoner was brought into his presence the judge, on release being demanded, had to satisfy himself that the captive was detained on some ground which would be valid in a court of law. The writ, however, was not particularly efficacious, as the gaoler to whom it was addressed could evade liability by proving change of prison as an excuse for non-production of the accused.

The numerous ways in which the right to a release could be evaded occasioned great indignation in the reign of Charles I., when Sir Thomas Darnell demanded his freedom on the ground of illegal detention. In this case venal judges held that the fact of Sir Thomas being detained by the royal command was quite sufficient, irrespective of any question of legality. Later on the Petition of Right provided unequivocally that the orders of the Sovereign were not in future to be sufficient justification for the imprisonment of his subjects. In the reign of Charles II. (1676) a man named Jenks was arrested, and afterwards, on a writ of *habeas corpus* being applied for, the court held that change of prison quarters amply exempted the governor of the prison from liability for not delivering up the prisoner. The treatment of the prisoner, who had been confined during the Long Vacation,

excited popular sympathy, and in 1679 the Habeas Corpus Act of that year (applying to criminal cases only) was passed.

Habeas Corpus Act, 1679.—This statute provides :—

1. That on complaint in writing by or on behalf of any person charged with any crime (unless he were committed for treason or felony plainly expressed in the warrant, or as accessory, or on suspicion of being accessory, before the fact to any petit treason or felony, &c., or unless he were convicted or charged in execution by legal process), the Lord Chancellor, or any of the judges in vacation, upon viewing a copy of the warrant, or upon affidavit that a copy is denied, shall (unless the party has neglected for the two whole terms after his imprisonment to apply to any court for his enlargement), award a writ of *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges, and upon service thereof the officer in whose custody the prisoner is shall bring him before the said Lord Chancellor, or other judge, with the return of such writ, and the true cause of the commitment, and thereupon, within two days after the party shall be brought before them, the said Lord Chancellor, or other judge, shall discharge the prisoner if bailable, or on giving security, to be fixed according to their discretion, to appear and answer to the accusation.

2. That such writs shall be endorsed as granted in pursuance of the Act and signed by the person awarding the same.

3. That the writ shall be returned and the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days after service of writ.

4. That officers and keepers neglecting to make due returns or not delivering to the prisoner or his agent within six hours after demand a true copy of the warrant of commitment, or shifting the custody of the prisoner from one prison to another without sufficient reason or authority (see section 8), shall for the first offence forfeit £100 and for the second offence £200 to the party aggrieved, and be disabled to hold his office.

5. That no person once delivered by *habeas corpus* shall be re-committed for the same offence on penalty to the party aggrieved of £500.

6. That every person committed for treason or felony shall, if he requires it, the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail, unless it appear on oath made that the King's witnesses cannot be produced at that time; and if acquitted or not indicted or tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person after the assizes shall be open for the county in which he is detained shall be removed from the common gaol by *habeas corpus* till after the assizes are ended, but shall be left to the justice of the judges of assize.

7. That any such prisoner may move for and obtain his *habeas corpus* as well out of the Chancery or Exchequer as out of the King's Bench or Common Pleas, and the Lord Chancellor or judge denying the same on view of the copy of the warrant or oath that such copy is refused shall forfeit severally to the party grieved £500.

8. That this writ of *habeas corpus* shall run in the counties palatine, the cinque ports and other privileged places, and the islands of Guernsey and Jersey.

9. That no inhabitant of England (except as in this section excepted) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, Tangier, or other place beyond seas within or without the King's dominions, on pain that the party committing, his advisers, aiders and assistants shall forfeit to the party grieved a sum not less than £500, to be recovered with treble costs, shall be disabled to have any office of trust or profit, and shall incur the penalties of a praemunire, and shall be incapable of receiving the King's pardon for any of the said forfeitures, losses and disabilities (*e*).

The defects of the above Act were as follows :—

1. There was no protection where the bail was fixed too high.
2. The return to the writ might not be truthful.
3. Illegal civil detention was ignored.

The Bill of Rights provides that bail be not excessive, and the

(*e*) This summary of the Habeas Corpus Act has been, by permission of the proprietors of the copyright, taken from Taswell-Langmead's Constitutional History, 5th ed., pp. 520, 521.

Bail Act, 1898, gives power to magistrates to admit persons to bail, with or without sureties, when such magistrates have power to grant bail under section 23 of the Indictable Offences Act, 1848; and by the Criminal Justice Administration Act, 1914, a magistrate who issues a warrant is empowered to state in writing on the back of such warrant the amount of bail he is prepared to accept, which bail may be taken before the superintendent of police.

By 56 Geo. III. c. 100, the Habeas Corpus Act has been extended so as to embrace cases of civil detention. By this Act judges are required, upon complaint made to them, to issue in vacation writs of *habeas corpus* returnable immediately, in cases other than for criminal matter, or for debt, or on civil process. Any person disobeying a writ sued out under the above Act is to be deemed guilty of a contempt of court, and becomes liable to be sent to prison for such contempt. Provision is further made that where on the face of it the return to the writ, which is addressed to the person detaining, shows a valid ground for the course pursued, the judge may yet go into the merits of the case.

Habeas corpus to places abroad.—The writ runs to the Channel Islands and Isle of Man (31 Car. II. c. 10, s. 10; 56 Geo. III. c. 100, s. 5), but it cannot issue into a British colony or foreign dominion of the Crown where a court of competent jurisdiction has been established. (See 25 & 26 Vict. c. 20.)

Uses to which the writ of habeas corpus has been put.—The writ of *habeas corpus* has been used to set free slaves during the period when slavery was lawful in England (*f*).

(*f*) Slavery was a legal institution in our country till the days of James I. In this reign one Caley claimed the horse of one Pigg, whom the defendant (Caley) alleged was his *villain regardant*. Pigg brought an action, and the court held in doubtful cases that slavery was obsolete, and that law was "in favorem libertatis." In or about 1772 one *Sommersett*, the slave of an English colonist, came to England with his master. As the master put him under arrest a writ of *habeas corpus* was applied for, and the court held that any slave who set foot in England became *ipso facto* free (Broom, Constitutional Law, p. 59). In the case of *The Girl Grace* (1827), 2 Hag. Adm. 94; Thomas, 110, a female slave accompanied her mistress to England, and then returned with her to the colony where she had been a slave. Here the court held that the fact of such voluntary return caused her to relapse into the

The provisions of the second Habeas Corpus Act have been made use of to restrain the rights of a parent over a child and a guardian over his ward. Where a father, as is almost universally the case, is the guardian of his child, he can generally enforce his rights to the custody of such child, though by comparatively recent legislation the rights of the mother are recognised also. Again, the mother of a bastard child can claim the custody of such child as against the reputed father by suing out a writ of *habeas corpus*. Where a father is unfit to have the custody of a child, the court will deprive him of such custody.

Modern practice as to writs of habeas corpus.—Where a writ has been sued out, the modern practice is either to instruct counsel to move the Divisional Court of the King's Bench Division or to apply by summons to a King's Bench Division judge sitting in chambers; but where the case is one of extradition, a motion must, except in vacation, be made by counsel to the Divisional Court (Crown Office Rules, 1906, r. 219). At the hearing the court may make either an order absolute for the issuing of the writ "*ex parte*," or may make an *order nisi*, thus giving an opportunity for the person detaining the prisoner to oppose. Where time is not of grave importance, a *rule nisi* is made, and the applicant then issues a summons, which is served on the respondent, at the hearing of which the judge determines whether or no he will accede to the application. The person to whom the writ is addressed, *i.e.*, the person detaining the prisoner in civil or criminal custody, is obliged to state in his return to the writ all causes for detention, if more than one, and it is not necessary to endorse these causes on the writ, as they may be set out in a

status of a slave Slavery in English colonies has now been abolished, and Englishmen are forbidden, under pain of severe criminal punishment, to traffic in slaves, fit out ships to be used in the slave trade, or do various other things connected therewith. (See Stephen's Digest of Criminal Law, pp 82—86.)

In the case of *Forbes* v. *Cochrane* (1824), 2 B & C 448, Thomas, 109, the liberty of a slave who escaped to a British ship was expressly recognised.

schedule which must be annexed to the writ (Crown Office Rules, 1906, r. 222).

A prisoner or anyone suing out process on his behalf may impeach the return to the writ by affidavit (*The Canadian Prisoners' Case* (1839), 3 St. Tr. (N. S.) 963).

When the person detained is produced in court or chambers the judge may either—

1. Make no order at all.
2. Discharge the person detained.
3. Award bail.

In the case of *R.* v. *Richards* (1844), 5 Q. B. D. 926, it was held that where a commitment order is disputed for a reason which is purely technical, a properly drawn up warrant or order may be substituted for the original one. In the above case the return stated that the prisoner was committed to gaol for three months by the order of a magistrate. The warrant of commitment recited a conviction which was bad on its face. The return further stated that a week after the committal, whilst the prisoner was still in custody, the same magistrate delivered to the gaoler a fresh warrant of committal relating to the same offence, in which the matter was put right. The court held that the prisoner was not entitled to be discharged from custody, as the return disclosed a good warrant for his detention. (See *R.* v. *Allen* (1860), 30 L. J. Q. B. 38, as to warrant irregularly signed.)

In *R.* v. *Halliday*, [1917] A. C. 260, Zadig, the applicant, a German by birth, was naturalized in England in 1905. During the war he was, by virtue of a regulation made under the Defence of the Realm Act, 1914, interned as a person of hostile origin and association. Proceedings were taken, and finally the matter came before the House of Lords, where by a majority the action of the Secretary of State was supported. The case is a remarkable one on account of the divergence between the regulation and the Act conferring the power to make it. Lord Finlay supported the action of the Executive, but Lord Shaw, in a noteworthy speech, expressed the view that the action taken against Zadig was not only *ultra vires* but an invasion of the liberty of the subject. The Defence of the Realm Act gave general powers to

the Executive, and though a decision of the House of Lords is binding, it is still open to doubt whether a regulation permitting a British subject to be imprisoned on account of hostile origin or associations, and not only to be imprisoned but to be kept in prison indefinitely without trial, was justifiable in an ethical sense. The Executive, all things considered, were perhaps justified, but this is a mere matter of opinion. In another case a woman who was a natural-born subject, but who had perhaps been imprudent in the choice of her associates, and on whose premises suspicious documents were found, was interned as a person of hostile origin or association. This was a case of arbitrary imprisonment without trial in the opinion of vigorous asserters of the liberty of the subject. Another important case was that of Art O'Brien, who was sent in custody to the Irish Free State by virtue of a regulation made under the Restitution of Order in Ireland Act, 1920, and was set at liberty by the Court of Appeal in proceedings by writ of *habeas corpus*. The case, which ultimately went to the House of Lords, was remarkable in two ways : (1) The fact of such writ being directed to the Home Secretary instead of to the governor of the gaol being approved; (2) The decision that where imprisonment has been held to be illegal, no further appeal can be permitted, even though the order of the Court does not go so far as to order the discharge of the prisoner from custody. The reason for the discharge of the prisoner was that the Irish Free State Constitution Act, 1922, repealed partially, by implication, the Restoration of Order in Ireland Act, 1920.

Appeal to the Court of Criminal Appeal (*g*).—The new Criminal

(*g*) *Court for Crown Cases Reserved.*—This Court was established by 11 & 12 Vict. c. 78, s. 1, and lasted till the Criminal Appeal Act, 1907, came into force. Prior to the establishment of this Court it was the practice of judges to reserve points of law in favour of a prisoner for the opinion of their colleagues, and there were informal gatherings of judges at which counsel for both sides were present. By 11 & 12 Vict. c. 78, s. 1, where a person shall have been convicted of any treason, felony, or misdemeanour, the judge at the trial might at his discretion reserve a point of law for the consideration of a tribunal of common law judges to be called the Court for Crown Cases Reserved. There was no obligation on the part of the judge to reserve a point, and if he did not, the only remedy was to petition the Sovereign. The judges might consist of any uneven number between three and thirteen, and the verdict of the majority prevailed. This Court was not affected by the Judicature

Appeal Act, 1907 (c. 23), does not interfere with the right of the Crown to pardon or commute criminal sentences. It provides, *inter alia*, that a person convicted on indictment may appeal to the Court of Criminal Appeal against his conviction on any ground of appeal involving a question of law, and where the leave of the Criminal Appeal Court has been obtained, or the judge who tries the case awards to the prisoner a certificate authorising appeal, such prisoner may appeal on any question of law and fact, or fact alone, provided the court is satisfied that the ground of appeal is a sufficient one. A convicted man may also by leave appeal against his sentence, unless such sentence is one fixed by law; but where a sentence is appealed against, a more severe one may be passed by the Appeal Court.

Persons found by the magistrates at petty sessions to be incorrigible rogues, after being sentenced at quarter sessions can appeal to the Court of Criminal Appeal (see Criminal Appeal Act, 1907), and by the Criminal Justice Administration Act, 1914, persons sentenced to Borstal treatment have the like privilege.

The court has power, whenever a conviction is appealed against, to dismiss the appeal, notwithstanding the fact that they are of opinion that the point relied on by the appellant is sound, provided they also think that no substantial miscarriage of justice has occurred (section 4, sub-section 3).

Notice of appeal must be given within ten days after conviction, and no sentence either to death or corporal punishment can be executed till the time for giving notice of appeal has expired, or, where notice of appeal has been given, until the appeal has been heard. The court may examine witnesses if they think fit, and may admit the prisoner to bail pending appeal. An appeal lies from the Criminal Appeal Court to the House of Lords in certain cases.

Where the Home Secretary has received a petition for pardon on behalf of a convicted prisoner, he may submit the case, or any point arising thereon, for the opinion of the Court of Appeal (section 19).

Acts. Quarter session judges and recorders could reserve points just as a superior Court judge could.

Appeals from sentences to imprisonment passed by magistrates.—By the Summary Jurisdiction Act, 1879, s. 19, an appeal lies to the Court of Quarter Sessions on the merits where a person has been sentenced to imprisonment without the option of a fine by magistrates.

There are also, in certain cases, remedies against erroneous convictions by writs of certiorari, and magistrates may furthermore be required to state a case on a point of law for the opinion of the High Court.

The right to trial by jury.—By the Summary Jurisdiction Act, 1879, s. 17, a person charged with an offence in respect of which he is liable to be imprisoned for a term exceeding *three months* (cases of assault excepted) can demand to be tried before a jury, and magistrates have to inform prisoners of their rights in this respect, and where the accused is a child of tender years his parent or guardian may exercise this option of trial by jury on his behalf. For the history of criminal and civil juries, see Appendix C.

Powers of detention in non-criminal cases.—Children, lunatics and persons incapable of taking care of themselves—as, for instance, a man suffering from delirium—can, of course, be restrained for their own protection. So, too, persons suffering from dangerous infectious illness may, under recent legislation, be compulsorily isolated, and habitual drunkards may, under certain conditions, be committed to a reformatory or, with their own consent, be detained for a specified period in a retreat.

Use of force.—The Criminal Code Bill Commissioners, in their report dated 1878, state as follows :—"We take one great principle of the common law to be that though it sanctions the defence of a man's liberty and property against illegal violence, and permits use of force to prevent crimes, to preserve the public peace, and bring offenders to justice, yet all this is subject to the restriction that the force used is necessary : that the mischief sought to be prevented could not be prevented by less violent means, and that the mischief done be only what might be reasonably anticipated from the force used, and not be disproportionate to the mischief which it is intended to prevent."

Mr. Serjeant Stephen, in his Commentaries, states as follows: —"In the case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation, or property against anyone who manifestly intends, or endeavours with violence or surprise, to commit a felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he find himself out of danger, and if in a conflict between them he happens to kill, such killing is justifiable."

Stephen, J., says:—"The intentional infliction of force is not a crime when it is inflicted by any person to arrest a traitor, felon, or pirate who has escaped, or is about to escape, from such custody, although such traitor, felon, or pirate offers no violence to any person" (Digest of Criminal Law, p. 158).

Force, again, may be used by a father to protect a son; by a husband to protect a wife; by a son to protect a father; and generally the strong may come to the assistance of the weak without breaking the law.

Reasonable assault and battery may be committed with impunity when one is acting (1) in defence of person or property; (2) when one occupies a peculiar relationship to the person assaulted or beaten, *e.g.*, a father may moderately chastise his child; (3) in the preservation of the public peace.

CHAPTER V.

LIBERTY OF DISCUSSION.

British subjects in the United Kingdom may speak and publish what they choose provided that the law is not infringed.

The law of liberty of discussion is chiefly concerned with defamation, sedition, blasphemy, and obscenity. Defamation denotes publishing, orally or in writing, defamatory matter concerning a person, such defamatory matter being calculated to prejudice him in his calling or trade or to hold him up to ridicule, hatred or contempt.

Where the defamatory matter is either written, printed, or consists of a picture, effigy, or assumes some other permanent form, it is libel; where it is oral, it is slander.

Defamatory libel calculated to bring about a breach of the peace is a criminal as well as a civil offence, but slander, except in rare instances, is only a civil wrong.

(For the distinctions between libel and slander and other useful information, see Odgers, Common Law, ch. 10).

Truth, again, is a defence to a civil action for libel, and also to one for slander, but it is no defence to a criminal libel unless defendant can prove truth and that publication was for the public good.

Publication is the communication of defamatory matter to a person other than the one defamed, and affects the author, the printer, the publisher, the communicator, and even the careless seller of a libel, and also the originator and the repeater of a slander. No publication to a third person is necessary to obtain a conviction for criminal libel.

Privileged communications.—Certain communications are absolutely privileged, *i.e.*, they are under no circumstances punishable civilly or criminally, whilst other statements are only privileged if they are not malicious in fact.

The following are absolutely privileged :—

(1) Judicial proceedings, including documents necessary to the case of a litigant, and also all proceedings in a court, freedom of speech being accorded to judges, counsel, and other advocates, litigants conducting their cases in person, and witnesses (cf. *Royal Aquarium Co.* v. *Parkinson*, [1892] 1 Q. B. 451). But a witness is not protected in respect of statements made before he is sworn or after leaving the box (*Trotman* v. *Dunn* (1815), 4 Camp. 211). As to privileges of judges, see p. 34. In *Munster* v. *Lamb* (1883), 11 Q. B. D. 588; Thomas, 156, it was held that an advocate cannot be sued for defamation because he has made use of violent language in open court whilst actually conducting a case, even though the language be spiteful and dictated by personal antipathy. Where he goes beyond proper bounds he can be committed for contempt of court (*Ex parte Pater* (1864), 5 B. & S. 299). A man who is conducting his defence is allowed considerable latitude, especially if the charge is a criminal one, but instances have occurred of prisoners being fined for conduct of this kind (cf. *R.* v. *Davison* (1821), 4 B. & Ald. 329). In certain criminal cases evidence of a previous conviction is admissible before the jury have given their verdict, but only in certain specified instances, *e.g.*, where the prisoner or his advocate has attacked with unnecessary violence the prosecutor or his witnesses, evidence of such previous conviction may be given (Criminal Evidence Act, 1898). *Ex parte* proceedings are those where only the applicant is present, and when applications of this kind are made in open court they afford opportunities for vindictiveness and malice. In *Kimber* v. *The Press Association* (1893), 62 L. J. Q. B. 152, the plaintiff was a professional gentleman of respectability, and application for criminal process against him was made to a country bench of magistrates, Though the application was refused, Mr. Kimber sustained damage and sued for defamation, but lost his case because the magistrates, in the exercise of their discretion, heard the matter in open court.

The publication without malice of a fair and accurate report of proceedings in open court before magistrates upon the *ex parte* application for the issue of a summons is privileged (*ibid.*). For further information the reader is referred to the cases of *Ponsford* v. *The Financial Times* (1900), 16 T. L. R. 248; *Chaloner* v. *Lansdown* (1894), 10 T. L. R. 290; *Adam* v. *Ward*, [1917] 2 A. C. 332; *Usill* v. *Hales* (1878), 3 C. P. D. 319; Thomas, 159; *Davison* v. *Duncan* (1857), 26 L. J. Q. B. 104; Thomas, 161; *Curry* v. *Walter*, Thomas, 159.

(2) Words uttered in either House of Parliament by members (see *post*, p. 291 *et seq.*).

(3) State communications, which include, possibly, statements made by all persons in government employ as to State business.

(4) Proceedings at a court-martial or a military enquiry (*Dawkins* v. *Rokeby* (1875), 7 H. L. 544).

(5) Reports made in pursuance of military duty (*ibid.*).

(6) Fair and accurate reports in newspapers of proceedings publicly heard before a court exercising judicial authority if published contemporaneously and neither blasphemous nor indecent.

(7) Reports and other documents published by order of either House of Parliament (see p. 302 *et seq.*).

The following communications are privileged in a qualified sense :—

(A.) Communications made in pursuance of a legal, social, or moral duty (cf. *Stuart* v. *Bell*, [1891] 1 Q. B. 530). This may possibly include communications by a government official to his superior.

(B.) Statements in his own defence by a man who has been attacked (cf. *Koenig* v. *Ritchie* (1862), 3 F. & F. 413).

(C.) Communications between persons possessing a common interest (*Hunt* v. *G. N. Railway*, [1891] 2 Q. B. 191).

(D.) Reports of judicial proceedings not covered by section 3 of the Law of Libel Amendment Act, 1888. These are not privileged if inaccurate, biased or not published *bona fide*, or when blasphemous or indecent. This privilege is not

confined to newspapers, and includes reports of *ex parte* proceedings.

No protection exists when the publication of proceedings is prohibited by order of court.

(E.) Faithful and correct reports of parliamentary debates, and also fair and reasonable comments by public writers on matters of public interest (see *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73) (*a*).

(F.) Fair and accurate reports in any newspaper of the proceedings of a public meeting or (except where neither the public nor newspaper reporters are admitted) of a meeting of any vestry, town council or other public body mentioned in section 4 of the Law of Libel Amendment Act, 1888, or of documents published at the request of any government department or any official specified in the Act. A public meeting, for the purposes of the Act, is any meeting *bona fide* and lawfully held for a lawful purpose, whether admission thereto be general or restricted.

Press privilege.—The statutory defence of apology is an important concession to the Press and persons interested in periodical publications. Defendant may prove by way of defence absence of malice and gross negligence, and also that a full apology has been inserted at the earliest opportunity or, where the above course is impossible, the making of a full apology has been offered.

Payment of money into Court by way of amends must also be made. (For further particulars, see R. S. C., Ord. XXII., rule 1.)

When journalists are charged with criminal libel they may be dealt with summarily where the libel is trivial, and fined up to £50 (Newspaper Libel, &c., Act, 1881, ss. 4 and 5).

In newspaper actions defendant may prove in mitigation of damages that plaintiff has received, or has agreed to receive,

(*a*) It is perhaps doubtful whether the defence of fair comment comes under the heading of qualified privilege, but it is one of those topics which concern the constitutionalist and yet cannot be dealt with conveniently in outline. The reader is therefore referred to Odgers's Common Law, 2nd ed., vol. 2, pp. 527 to 530.

compensation from other sources (Law of Libel Amendment Act, 1888, s. 6).

Censorship of stage plays.—From the time of Henry VIII. downwards, the drama has been controlled by the Executive. Under the Theatres Act, 1843, the Lord Chamberlain has a jurisdiction—(1) to forbid the performance of unlicensed stage plays anywhere; (2) to license theatres in certain places. He has an arbitrary right under the Theatres Act, 1843, to prohibit any stage play whenever he thinks its public performance would militate against good manners, decorum and the preservation of the public peace; and in order that he may exercise complete supervision, all new plays and all old plays which have been altered must be submitted to him, and fees for perusal paid. He has local jurisdiction to license all theatres in the cities of London and Westminster, in Finsbury, Marylebone, the Tower Hamlets, and also in Windsor and other places where the King possesses a royal residence.

The county councils license places to be used in their counties, and at Oxford and Cambridge the university authorities possess a veto as to the performance of plays within their respective jurisdiction. (Report of the Joint Committee of the Lords and Commons, November 8, 1909.)

Blasphemy.—The late Mr. Justice Stephen says :—"Every publication is said to be blasphemous which contains matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the Church, or to promote immorality.

"Publications intended in good faith to propagate opinions on religious subjects, which the person publishing them regards as true, are not blasphemous within the meaning of the definition merely because their publication is calculated to wound the feelings of Christian people, or because their general adoption might tend by lawful means to alterations in the constitution of the Church as by law established." "Blasphemous writings," he continues, "are libels, and also misdemeanours" (Digest of Criminal Law, p. 125).

Denial of Christian truths.—The learned judge also mentions another offence dealt with by 9 Will. III. c. 32, whereby persons educated in or professing the Christian doctrines incur various disabilities and punishments when they, by writing, printing, teaching, or ill-advised speaking, deny the truth of the Christian religion or the Holy Scriptures or their Divine authority. He also mentions the misdemeanours of depraving the Lord's Supper (see Digest of Criminal Law, p. 128; see also 1 Edw. VI. c. 1, s. 1) and defaming the Book of Common Prayer (see Digest of Criminal Law, p. 128).

Blackstone mentions the offence of apostacy or denial of the Christian truths, and also heresy or denial of some essential doctrine of Christianity; but all these offences are now practically obsolete, blasphemy excepted (*b*).

The offence of profane and common swearing is quoted by Blackstone, and also Stephen, as an offence against religion, and they tell us that it is a misdemeanour punishable by a small fine or a short alternative period of imprisonment. This offence is obsolete, save in so far as it may come within the range of certain by-laws.

Obscenity.—It is a misdemeanour to write, make and publish obscene and criminal books, pictures, &c., when the writing, picture, effigy, &c., has a tendency to deprave and corrupt those whose minds are open to immoral influence (*R.* v. *Hickling* (1868), 11 Cox, 26). Purity of motive is no excuse for the publication of indecent matter (*ibid.*).

Uttering obscene words before a large number of persons may also constitute a misdemeanour (Odgers on Libel, 5th ed., pp. 505 *et seq.*).

Exhibiting publicly for sale or otherwise indecent writings, &c., is criminal, but not mere possession of same (*id.*).

In *R.* v. *Bradlaugh and Besant* (1878), 3 Q. B. D. 569, an indictment for obscene libel was quashed because the indecent matter constituting the libel was not set out at full length, but

(*b*) Persons are still, in theory, liable to censure and punishment at the instance of an ecclesiastical court for fornication, adultery, and other deadly sins, and also for heresy, according to Prof. Maitland; but these proceedings are also obsolete (see Stephen's Digest of Criminal Law).

by the Law of Libel Amendment Act, 1888, it appears to be no longer necessary to do this.

By the Post Office Act, 1870 (c. 79), the Postmaster-General, with the consent of the Treasury, may make regulations for stopping in the post the transmission of indecent matter.

It is also a misdemeanour to send by post indecent writings, prints, cards, &c. (Post Office Protection Act, 1884 (c. 76)).

By the Indecent Advertisements Act, 1889 (c. 18), it is a summary offence to place an indecent advertisement or to write indecent words or otherwise publish indecent matter on any building, wall, gate, public urinal, &c.

By 20 & 21 Vict. c. 83, s. 1, any court of petty sessions on complaint on oath being made that any obscene documents are in any house or other place for sale or other purpose of gain may issue a search warrant to have such articles searched for, seized and brought into court. A summons can then be issued against the occupier of the place in question to show cause why such articles should not be destroyed, and they may be destroyed after the time for appeal has expired unless cause be shown to the contrary.

There are certain formalities to be complied with as to the drawing up of the order, and the court must be satisfied that the works, &c., are obscene before granting the search warrant, and there must be some evidence of sale or exhibition for purposes of gain.

CHAPTER VI.

THE RIGHTS OF PUBLIC ASSOCIATION AND PUBLIC MEETING.

Liberty of association.—The general rule of English law allows complete liberty of association for any lawful object—*e.g.*, people may combine to form a club or society or a partnership without any permit from the Government and without *fulfilling* any *legal formality*. But various statutes have restricted this common law freedom—e.g., a club which supplies intoxicating liquors must be registered and comply with certain formalities; a trading company must not consist of more than twenty members, or a banking company of more than ten, unless it registers under the Companies Acts.

The right to combine has formed the subject of considerable controversy, and there are four important statutes on the subject, viz., the Trade Union Act, 1871, the Conspiracy and Law of Property Act, 1875, the Trade Disputes Act, 1906, and the Trade Union Act, 1913.

Industrial disputes and kindred matters are capable of assuming such serious dimensions as to threaten the tranquillity of the State, and therefore they demand the attention of the Executive and the Legislature.

A combination of persons to effect any common purpose is *prima facie* legal. But a combination to do an unlawful act, or to do a lawful act by unlawful means, is an actionable conspiracy.

Before the Trade Disputes Act, 1906—a statute subject to which many important decisions must be read—there were the following important cases decided: the *Mogul Case* (1889), 23 Q. B. D. 598, where it was held that persons might combine to keep trade in their own hands when not actuated by a malicious motive, though the acts done necessarily injured a rival in trade; *Allen* v. *Flood*, [1898] A. C. 531 (a case not involving a combination of persons), where it was held that where the act complained of was legal the fact of a defendant being actuated by a malicious motive was immaterial; *Quinn* v. *Leathem*, [1901]

A. C. 495, where it was held that "a combination of two or more, without justification or excuse, to injure a person in his trade by inducing customers or servants not to deal with him or continue in his employment, thus causing him damage," was illegal; *Pratt and Others* v. *British Medical Association*, [1919] 1 K. B. 244, where it was held that to procure the boycotting of a medical man by his fellows by intimidating other members of the profession into abstaining from ordinary professional dealings with him (*e.g.*, from meeting him in consultation) was illegal. Here the judgment of McCardie, J., in the Court below was upheld by the Court of Appeal; *Ware* v. *The Motor Association*, [1921] 8 K. B. p. 40), where it was held that the defendant association could fix retail prices for cars and publish black-lists of traders who declined to be guided by their rules, and see now *Sorrell* v. *Smith*, *The Times*, May 16, 1925, judgment of the House of Lords.

It is not easy to reconcile these decisions, particularly as to the effect of a malicious motive on the part of the defendants, upon the legality of their action. It would seem, though, that the principle upon which they are all really founded is this: the defendants' act is lawful where their governing aim is the promotion of their own legitimate common interest, notwithstanding that such promotion involves deliberate damage to the interests of others. The defendants' act is unlawful where damage is inflicted upon others out of spite, and the promotion of the alleged common interest is a mere pretext for its indulgence. What is here referred to as the promotion of a legitimate common interest is often called, in the decisions, "lawful justification or excuse."

In some of the above cases, e.g., *Allen* v. *Flood* and *Quinn* v. *Leathem*, there was a suggestion that an act which if done by an individual would afford no cause of action might be actionable if done by a number of persons acting in combination. At the time of these decisions the Conspiracy and Protection of Property Act, 1875, was in force. Section 3 of this Act relieves of criminal liability any persons who combine to do, in contemplation or furtherance of a trade dispute, any act which would not be punishable as a crime if done by one person.

The Trade Disputes Act, 1906, effected three important

changes in the law. First, it extended the immunity just referred to to civil proceedings (section 1). Secondly, it provides that the act of inducing A to break a contract with B (which is a tort in ordinary circumstances) shall not be actionable if done in contemplation of a trade dispute. Thirdly, apart altogether from any question of a trade dispute, it relieves trade unions (by section 4) from all liability in respect of any tortious act alleged to have been committed on their behalf.

Of considerable importance in a constitutional sense is the practice of trade unions diverting the subscriptions of their members to political purposes without their consent. In *Amalgamated Society of Railway Servants* v. *Osborne*, [1909] A. C. 87, it was held in the House of Lords that "there was nothing in the Trade Union Acts from which it could be reasonably inferred that trade unions were meant to have the power of collecting and administering funds for political purposes, and that a rule purporting to confer on a trade union registered under the Act of 1871 a power to levy upon members contributions for the purpose of securing parliamentary representation, whether it were an original rule of the union or subsequently introduced, was *ultra vires* and illegal."

By the Trade Union Act, 1913, restrictions have been imposed (section 3) on the application of funds for certain political purposes, and a member may at any time give a formal notice according to the terms of the Act that he objects to contribute to the political fund of the union. Section 3 also provides that the contributions of members shall not be applied for political purposes unless a ballot has been taken.

The Emergency Powers Act, 1921 (see Appendix) enables his Majesty by proclamation to make regulations creating summary offences punishable by fine or imprisonment, or both, when the tranquillity of the State has been disturbed by combinations which have a tendency to deprive the general public of fuel, light, food, or the means of locomotion.

There are numerous other associations forbidden by law, *e.g.*, gambling clubs, but it may be mentioned that it is a criminal conspiracy to raise the price of stocks by circulating false rumours (*R.* v. *De Berenger* (1814), 3 M. & S. 67).

General right of public meeting.—It is a rule of English law that any given person can meet another given person or an indefinite number of persons at any appointed place so long as the law is not thereby broken. As a rule, people may assemble in any numbers in a *private* place for a lawful object, provided they do not become a nuisance to others or break the law. To understand the legality of any given public meeting it will be necessary to enquire into the law as to unlawful assemblies, routs and riots (cf. *R.* v. *Vincent*, 9 C. & P. at p. 109).

Unlawful assemblies.—Mr. Serjeant Stephen defines an unlawful assembly as "a meeting of great numbers of people with such circumstances of terror as cannot but endanger the peace, and raise fears and jealousies amongst the subjects of the realm."

It has been decided that where persons assemble to witness a prize fight the assembly is an unlawful one (*R.* v. *Billingham* (1825), 2 C. & P. 234).

Where, however, people assemble for a lawful object without intending to commit a breach of the peace, though they have reason to believe that there will be such a breach in consequence of their meeting being opposed, such persons do not, according to the decision in *Beattie* v. *Gillbanks*, constitute an unlawful assembly (*Beattie* v. *Gillbanks* (1882), 9 Q. B. D. 308).

In this case a certain section of the Salvation Army marched about the streets of Weston-super-Mare singing hymns and disturbing the tranquillity of owners and occupiers of property in that town. An opposition army, called the Skeleton Army, was accordingly raised to oppose them. Fearing a disturbance, the local magistrates caused a notice to be served on the Salvationists not to assemble. In spite of this notice the assembly was persisted in. The two armies met, and a breach of the peace occurred. One Beattie, the commanding officer of the Salvationists, was convicted of being a member of an unlawful assembly by the bench, but the conviction was reversed on appeal by the Divisional Court for the reason above stated.

The case of *Wise* v. *Dunning*, [1902] 1 K. B. 167, presents the law in a different aspect, however. Here the plaintiff was a conscientious but violent denouncer of "the scarlet woman and

her creed." Clad in a peculiar costume, he gave religious addresses in places of public resort in Liverpool.

Certain Roman Catholics taking umbrage at these meetings and street brawls resulting, the magistrate bound Wise over to keep the peace and be of good behaviour. Proceedings were taken, on the hearing of which Darling, J., gave judgment to the following effect:—"To begin with, we have the appellant's own description of himself. He calls himself a crusader who is going to preach a Protestant crusade. In order to do this he supplied himself with a crucifix, which he waved about. . . . Got up in this way he admittedly made use of expressions most insulting to the faith of the Roman Catholic population. . . . There had been disturbances and riots caused by this conduct . . . and the magistrate has bound him over to be of good behaviour, as he considered that the conduct was likely to occur again. Large crowds assembled in the streets, and a riot was only prevented by the police. The kind of person which the evidence here shows the appellant to be I can best describe in the language of Butler. He is one of—

> 'That stubborn crew
> Of errant saints whom all men grant
> To be the true church militant;
> A sect whose chief devotion lies
> In odd perverse antipathies.'"

Finally the learned judge upheld the opinion of the magistrate. At first sight the case of *Wise* v. *Dunning* appears to overrule *Beattie* v. *Gillbanks*, but this is not a correct view, as will appear by the remarks of the judges in *Beattie* v. *Gillbanks* (1901), 71 L. J. K. B. 165. Field, J., said: "The finding of the justices amounted to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." In *Wise* v. *Dunning* Lord Alverstone said: "No reasonable man . . . can doubt that the police and the magistrate rightly concluded that the appellant, by holding these continual meetings attended by increasing crowds, by using language insulting to a religious sect to which the larger number of persons present might belong, and by inviting his own supporters to give him protection,

went very far indeed towards inciting the people, at any rate, to so behave as to occasion a breach of the peace."

Forbidden acts in places of public resort.—A crowd of persons cannot block up public thoroughfares or interfere with the general comfort of other persons lawfully using such place; neither can a man cause a crowd to assemble to the annoyance of owners and occupiers of adjacent land or houses.

By the Parks and Gardens Act (35 & 36 Vict. c. 15) provision is made for, *inter alia*, securing the enjoyment of the ordinary frequenters by giving power to make by-laws; and as to several of these parks penalties are imposed under by-laws for the delivery of any public address.

By the Municipal Corporations Act, 1882, borough councils can make by-laws for the general good government of the borough.

The same sweeping power has been conferred on county councils by the Local Government Act, 1888.

By the Local Government Act, 1894, certain powers of making by-laws respecting recreation grounds have been accorded to parish councils.

Meetings in London.—Some persons are under the impression that meetings may be held in Trafalgar Square to discuss grievances, but a reference to the case of *R.* v. *Graham and another* (1888), 16 Cox, 420, will convince them that they are wrong (*a*).

(*a*) The case of *R.* v. *Graham and another* is most important on account of the dicta of Mr. Justice Charles. One of the principles the learned judge laid down was to the following effect: "The law recognises no right of public meeting in a public thoroughfare—a public thoroughfare being dedicated to the public for no other purpose than that of providing a means for the public passing and repassing along it. A place of public resort is analogous to a public thoroughfare; and although the public may often have held meetings in places of public resort without interruption by those having control of such places, yet the public have no right to hold meetings there for the purpose of discussing any question whatever, social, political, or religious" (see headnote from which this extract is taken, *R.* v. *Cunningham Graham and another*, 16 Cox, 420).

In the same case the same judge defined a riot as "a disturbance of the peace by three persons at least, who act on intent to help one another against any persons who oppose them in the execution of some enterprise (lawful or unlawful), and actually execute that enterprise in a violent and turbulent

By 57 Geo. III. c. 19, the convention, or giving notice for the convention, of any meeting consisting of more than fifty persons, or for more than fifty persons to assemble in any street, square, or open space in the city or liberties of Westminster or county of Middlesex, within the distance of *one mile* from the gate of Westminster Hall, except such parts of the parish of St. Paul's, Covent Garden, as are within the said distance, to consider or prepare any petition or address to the King or either House of Parliament for the alteration of matters in Church or State, on any day on which the two Houses shall sit or be adjourned to sit, or on any day on which His Majesty's Court of Chancery, King's Bench, Common Pleas and Exchequer, or any of them, shall sit in Westminster Hall, is to be deemed unlawful, and the meetings, if held, are unlawful assemblies.

It is doubtful whether a meeting can be held within a mile, as the crow flies, of the Law Courts, as the Judicature Act, 1873, says that expressions in former Acts of Parliament referring to the old courts are to refer to the new High Court of Justice.

Tumultuous petitioning.—By 13 Car. II. stat. 1, c. 5, no person shall solicit the signatures of upwards of twenty persons to any petition to the King or either House for alteration of Church or State matters without previously obtaining the consent of one or other of the authorities mentioned in the Act. Furthermore, no persons above the number of ten shall repair to His Majesty or both Houses or either House of Parliament upon the pretence of delivering any petition or complaint, &c. The penalty for this offence is a fine up to £100 or three months' imprisonment, and the offender is to be tried within six months after committal of offence. Three witnesses are necessary to secure a conviction.

Revolutionary and dangerous meetings.—In order to put a stop to meetings of a mischievous character at which oaths are administered to members of a particular society, the following

manner, to the alarm of the people" (*R.* v. *Graham and another*, 16 Cox, 420).

statute was passed. 37 Geo. III. c. 123, provides that "Every person who shall in any manner or form administer, cause to be administered, or aid or assist or consent to the administering of any oath or engagement, or shall take any oath or engagement to embark in any seditious or mutinous purpose, or to break the peace, or belong to any society formed for such purpose, or to obey any leader or body of men not having by law authority for that purpose, or not to reveal any unlawful federation or combination, or any unlawful act done or to be done, shall be guilty of felony." The punishment prescribed is penal servitude not exceeding seven years (see, further, Russell on Crimes).

Unlawful drilling.—By 60 Geo. III. & 1 Geo. IV., c. 1, s. 1, persons attending illegal meetings for drilling or training in the use of arms, or practising military evolutions without authority from the King, or the lords lieutenants, or two justices for the county, riding, or borough, are liable to fine and imprisonment not exceeding two years.

A prosecution must take place within six months, or not at all.

Public Meeting Act.—By the Public Meeting Act, 1908 (c. 6), disorderly conduct at any lawful public meeting is punishable by fine not exceeding £5 or imprisonment not exceeding one month, and in the case of a political meeting between issue of the writ for the return of a Member of Parliament and the return, the offence is an illegal practice within the meaning of the Corrupt Practices Act of 1883.

CHAPTER VII.

ROUTS AND RIOTS AND MARTIAL LAW.

A rout is defined by Mr. Serjeant Stephen in his Commentaries as a disturbance of the peace by persons assembling together with an intention to do a thing which, if it be executed, will make them rioters, and actually making a motion towards the execution thereof (Commentaries, 14th ed., vol. 4, p. 174).

There must be three or more persons engaged to constitute a rout. The same learned author defines a " riot " as a tumultuous disturbance of the peace by three persons or more assembling together of their own authority with an intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended be of itself lawful or unlawful. A rout is a misdemeanour, like an unlawful assembly, and so is a riot in the first instance, though a riot may very easily become a felony, *e.g.*, where rioters burn a house or injure property.

In order to constitute a riot five elements are essential: (1) three or more persons; (2) a common purpose; (3) execution or inception of the common purpose; (4) intent to help one another by force if necessary against anyone who may oppose them in the execution of the common purpose; (5) force or violence displayed in such a manner as to alarm at least one person of reasonable firmness (*Field* v. *Receiver of Metropolitan Police*, [1907] 2 K. B. 853). Where damage has been caused by rioters the inhabitants of the hundred had to compensate persons who had lost property owing to the conduct of the rioters, but the law on this subject is now regulated by the Riot Damages Act, 1886, which provides that where a house, shop, or building in any police district, or the property therein, has been stolen, lost or injured owing to a riot, compensation to the persons aggrieved

is to be paid out of the police rate. In *Ford* v. *The Receiver for the Metropolitan Police District*, [1921] 2 K. B. 344, the facts were as follows: During the Peace Night in 1919, a good-humoured crowd entered an empty house and took away the woodwork and flooring to make a bonfire. A next-door neighbour told some of the mob that he hoped they would not touch his house, but made no attempt to prevent damage being done to his neighbour's house, alleging that he apprehended injuries should he interfere with the crowd. The Court held that the conduct of the crowd was a riot, that the transaction embraced all the five ingredients of a riot, that the next-door neighbour was a man of reasonable courage, and that he had been alarmed. Damages should therefore come out of the police rate. In *Pitchers* v. *Surrey County Council*, [1923] 2 K. B. 415, it was held that a mutinous disturbance created by soldiers in a camp where a civilian owned property, the said property being injured, was a riot within the meaning of the Riot Damages Act, 1886, s. 1. In *Jarvis* v. *Surrey County Council*, Weekly Notes, January 24, 1925, the facts were as follows: Certain property inside Whitley Camp was injured by Canadian troops, and the plaintiff had received from the Canadian authorities £750 in part satisfaction of damages sustained, and claimed the balance from the police district more than two years after the cause of action arose. The Surrey County Council contended that the claim was statute-barred under section 8 of the Civil Procedure Act, 1833, but Finlay, J., decided in favour of the plaintiff.

A riot is none the less a riot simply because the crime committed amounts to a felony. In *London and Lancashire Insurance Co.* v. *Bolands, Lim.*, [1924] A. C. 836, four armed men entered the premises of the respondent company, held up the employés with revolvers, and stole large sums of money from the cashier's office in Dublin. There was no disturbance at the time within the neighbourhood. The respondents had effected a policy with the insurance company under which the appellants were to be answerable for burglary, housebreaking, or theft, but not for damage caused by rioters. The Irish King's Bench Division and Court of Appeal decided in favour of the respondents, but the House of Lords held that the occurrence was a

riot and that the insurance company were exempted from liability.

The Riot Act.—Some persons think that before a riot can exist it is necessary to read the Riot Act. This is not so, as the effect of the statute is to constitute the rioters felons if they do not comply with the proclamation (see 21 Howell's State Trials, 493).

The Act (1 Geo. I., st. 2, c. 5) is to the following effect: Where twelve or more persons, being unlawfully and riotously assembled together to the disturbance of the public peace, are commanded by a magistrate, county sheriff or under-sheriff, mayor of a borough or a borough justice where such assembly shall be, by proclamation in the form thereinafter set forth to disperse themselves, and such persons shall to the number of twelve or more unlawfully and tumultuously remain together for one hour after the reading of the proclamation, such persons shall be guilty of felony.

The person authorised by the Act to read the proclamation shall go among the rioters, or as near to them as he can safely come, and with a loud voice command silence or cause silence to be commanded during the reading of the proclamation. The form of the proclamation is to be as follows: "Our Sovereign Lord the King chargeth and commandeth all persons being assembled immediately and peaceably to depart to their habitations or lawful business upon the pains contained in the Act, made in the first year of King George, for preventing tumults and riotous assemblies. *God Save the King*" (*a*).

Section 3 provides that if the twelve or more persons in question do not disperse within the hour, any justice, constable and such other persons as shall be commanded to be assisting unto such justice may seize and apprehend the rioters, and if any be killed or hurt when resisting apprehension the persons so killing are to be indemnified.

(*a*) *R.* v. *Child*, 4 C. & P 442. This case is referred to in the last edition of Archbold, and, from the way the editor deals with it, it may be inferred that the omission of the words "God Save the King" might save the prisoner from capital punishment, but would not exonerate him from penal servitude, perhaps for life (see Archbold's Criminal Pleading, p. 1169).

Section 5. Wilful opposition by force of arms to the reading of the proclamation is to be felony.

Section 8. Offences under the Act are to be prosecuted within twelve months.

Persons who happen to be on the spot are not to be treated as felons, unless evidence be forthcoming of some participation in the riot (*R.* v. *Atkinson* (1869), 11 Cox, 330).

Military and other force in riots.—The duty of maintaining order and restraining disorder rests with the local authorities, and not with the central government. Sheriffs, mayors of boroughs, and magistrates, are bound to suppress rioting, and they are also charged with the duty of dispersing unlawful assemblies. When the critical moment for the use of force arrives, force must be used, but not till then.

Military force may be resorted to when a riot is likely to be of a serious kind.

The primary duty of preserving order rests with the civil power. An officer should, where practicable, act under the orders of the magistrate, but when from fear of responsibility he abstains from acting because no magistrate is at hand, he does wrong.

Where officer and magistrate are acting in concert the former must take the latter's orders, and must not either fire without orders or refuse to fire when ordered. Still, circumstances may exist under which an officer may refuse to fire when ordered to do so (cf. Manual of Military Law, ed. 1907, p. 219).

In the case of *R.* v. *Pinney* (1866), 4 F. & F. 763, Littledale, J., made the following remarks: "A person, whether a magistrate or not, who has the duty of suppressing a riot, is placed in a very difficult situation, for if by his acts he causes death he is liable to be indicted for murder, and if he does not act he is liable for an indictment on information for neglect. He is, therefore, bound to hit the precise line of his duty. . . . Whether a man has sought a public situation or not . . . or whether he has been compelled to take the office which he holds, the same rule applies, and if persons were not *compelled* to act according to law there would be an end of society."

In *Keighly* v. *Bell* (1832), 5 C. & P. 254, Mr. Justice Willes

stated as follows : " I hope I may never have to determine how far the orders of a superior officer justify force. If compelled to determine that question, I should hold probably that those orders were an absolute justification in time of riot, at all events as regards enemies and foreigners, and probably also against natural-born subjects, unless the orders were not legally given. I believe the better opinion is that a soldier acting under the orders of his superior officer is justified unless the orders be *manifestly* illegal."

Soldiers refusing to obey orders of superiors are liable to be tried by court-martial. The whole question of calling in military force is discussed in the report of the Commission on the Featherstone Riots, cited at p. 220 of the Manual of Military Law.

Martial law.—Martial law is a term somewhat loosely employed to denote a number of quite distinct things. Chief among these are :—

(1) The law formerly administered by the Court of the Constable and Marshal.

(2) What is properly termed Military Law—the code governing the soldier, in war and peace, at home and abroad.

(3) The suspension of the ordinary law and the substitution for it of discretionary government by the Executive exercised through the military.

(4) The common law right and duty to maintain public order by the exercise of any necessary degree of force in time of invasion, rebellion, riot or insurrection.

(5) The law administered by a British general in occupied enemy territory in time of war, and

(6) (possibly) The law administered by a British general in an occupied district of ex-enemy territory.

Of (5) and (6) it is unnecessary here to say more than that the law so administered amounts to arbitrary government by the military, tempered by international custom (e.g., The Hague Conventions) and such disciplinary control as the British War Office or home Government think fit to exercise.

(1), (2), (3) and (4) call for further remark.

(1). *The Constable and Marshal.*

Reeves says little is known of this court till the time of Richard II., when, he alleges, it is alluded to as a court which decided cases of contract concerning deeds of arms. He says that in the second year of Richard II. the Commons petitioned that the Constable and Marshal should surcease from holding pleas of treason or felony, which matters should be determined before the King's justices. In consequence of the continued remonstrance of Parliament 8 Rich. II. c. 5 was passed, which provided that divers common law pleas should not be brought before the Constable and Marshal, but that the law should stand as it was in the reign of Edward III. The offices of Constable and Marshal were then hereditary and the heirs being infants their duties were discharged by the King. Another Act was passed after the heirs came of age (13 Richard II.) defining the jurisdiction of the court in the following way: "To the Constable belongs cognisance of contracts touching deeds of arms and war out of the realm, and also of things which touch war within the realm which cannot be determined or discussed by the Common Law with other usages to the same matters appertaining which other Constables before that time had duly and reasonably used." Maitland says that from a very early period the offices of Constable and Marshal were hereditary, and that they devolved on Henry IV. on his accession. The Constable and the Marshal were the leaders of the army and, as early as Edward I.'s reign, declined to lead the army to France. Edward IV. by letters patent in 1462 and 1467 conferred on the Court power to try all cases of treason by two commissioners. The tribunal "came to an end" with the accession of the Tudors, but in the reign of Mary there were trials by martial law, and Elizabeth and James I. granted commissions for trial of persons by martial law which were then not resisted (Maitland, p. 217).

(2). *Military law* is a code embodied in the Army Act, 1881 (*b*); the King's Regulations and Army Orders. It is a code to which soldiers alone are subject, and it constitutes a number of acts "military offences." These are mainly offences against discipline

(*b*) The Army Act is re enacted yearly by the Army Annual Act.

and offences committed by one soldier against another, but include also certain acts which are civil crimes (*c*). In respect of military offences a soldier is subject to the jurisdiction of the courts-martial, and in the case of minor military offences, to the summary jurisdiction of his company commander and commanding officer. It is important to note that the code does not divest the soldier of his rights or relieve him of his duties as an ordinary citizen. It merely imposes on him, in addition to those duties, a number of obligations and burdens peculiar to his class. A civilian striking an officer may expose himself to nothing more than an action for a common assault, but similar action by a soldier may call down upon him, under military law, penalties of extreme severity. A civilian refusing to pay a debt of honour incurs only social penalties; an officer guilty of such a refusal may be convicted by court-martial of "conduct unbecoming an officer and a gentleman." Again, many offences can from their nature be committed only by a soldier, *e.g.*, desertion, or being drunk on sentry duty. Courts-martial must proceed in dealing with matters within their cognisance on the same principles of evidence and procedure as civil courts.

The cases on military law are numerous and calculated to puzzle the reader, especially those cases where subordinates have taken proceedings against their commanding officers, but those points have been recently cleared up owing to the elaborate judgment of McCardie, J., in *Ileddon* v. *Evans* (1919), 35 T. L. R. 642; Mr. O'Sullivan on Military Law and the Supremacy of the Civil Courts. Space will not permit of a lengthy discussion of the subject, but the views of the judge will appear from the following extract: "A military tribunal or officer will be liable to an action for damages if, when acting in excess of or without jurisdiction, they or he do or direct that to be done to another military man, whether officer or private, which amounts to assault, false imprisonment or other actionable wrong, even though the injury inflicted purport to be done in the course of actual military discipline. Secondly, that if the act causing the injury to person or liberty be within jurisdiction and in the course

(*c*) There are, however, certain grave crimes in respect of which soldiers can only be tried by the ordinary Courts—*e.g.*, treason, murder, and rape.

of military discipline, no action will lie upon the ground only that the act has been done maliciously and without reasonable and probable cause."

For the last-mentioned of the above conclusions the learned judge cited *Dawkins* v. *Paulet*, L. R. 5 Q. B. 94; *Dawkins* v. *Rokeby* (1866), L. R. 8 Q. B. 255; Thomas, 128; *Marks* v. *Frogley*, [1898] 1 Q. B. 888; *Fraser* v. *Hamilton* (1917), 33 T. L. R. 481; and *Fraser* v. *Balfour* (1918), 87 L. J. K. B. 1116.

From the words of the judgment it appears that McCardie, J., did not consider himself free to hold that military wrongs arising from a malicious exercise of authority are cognisable in a court of law and that he was bound by that rule as was also the Court of Appeal.

He appears to agree with Lord Finlay, who said, in *Fraser* v. *Balfour*, that "the question is still open at all events in this House [the Lords] and it involves constitutional questions of the utmost gravity."

During the recent disturbances in Ireland after the passing of the Irish Free State Constitution Act, 1922, many persons were sentenced to death by courts-martial, amongst others Erskine Childers. He applied for a writ of *habeas corpus*, which was refused, on the ground that a state of war existed in Ireland at the time, and that the civil Courts were unable to discharge their duties (*R.* v. *Portobello Barracks Commanding Officer, Ex parte Erskine Childers* (1923), 67 S. J. 128). For the important case of *Clifford* v. *O'Sullivan*, [1921] 2 A. C. 570, the reader is referred to the excellent account of it given by Dr. Bellot in the fifth edition of Thomas's Constitutional Cases (p. 126). The offence charged was being in possession of firearms.

Three points should be noted in regard to military law :— (i) that it governs only soldiers (in which term are included Regulars, Territorials when embodied or in training, and Royal Marines when on shore); (ii) that the only acts of soldiers in respect of which they are amenable to military law are those which are constituted military offences by the Army Act; (iii) that military law does not confer on the soldier any privileged position *vis-à-vis* of civilians, or relieve him of any duties to which they are subject. It merely imposes on the soldier

burdens from which civilians are exempt. By this means the existence of a standing army is reconciled with the preservation of civil liberty. This, while a blessing to the public, is very embarrassing to the soldier when, as not infrequently happens, his duties as a soldier and as an ordinary citizen come into apparent conflict. As a soldier he must obey all lawful orders: as a civilian he must commit no crime or tort. If, therefore, he is ordered to commit some act which would in normal circumstances amount to a crime or a tort (*e.g.*, to fire on a mob) he must often at a moment's notice decide whether the special circumstances of the case make the order a lawful one—a duty calling for considerable tact, judgment and knowledge of jurisprudence; while, if in the course of this intricate calculation he makes a mistake, he exposes himself either to the risk of being court-martialled for disobeying a lawful order or of being indicted for obeying an unlawful one. In practice *bonâ fide* miscalculations are excused by the tribunal, whether civil or military, and obedience to an order not manifestly unlawful is treated as an answer to proceedings in the civil courts. It is a little difficult to gather from the decisions whether a soldier who has reasonably obeyed an order which was in fact unlawful is relieved of legal liability in respect of such obedience, or is excused by an act of clemency though technically liable (see *Keighly* v. *Bell* (1832), 5 C. & P. 254).

(3). This is martial law in the strict sense of the term. It is equivalent to what is known in some Continental countries as a "state of siege" or "the suspension of the constitutional guarantees," and amounts in effect to the temporary supersession of ordinary law by unlimited government at the will of the executive. Once it has been validly proclaimed, civilians can be tried by courts-martial, the most extensive interferences with the subject's normal rights of liberty and property can be practised with impunity by the government and its servants, and the victims of such interferences can obtain no redress in the ordinary courts of law, either at the time or later. Martial law in this sense is, in fact, no law at all. High authorities, notably Prof. Dicey, assert that it is unknown to our Constitution. Other eminent lawyers draw a sharp distinction between

powers (Forsyth: Opinion of Edward James and FitzJames Stephen, p. 554; and cf. *Wolfe Tone's Case* (1798), 27 St. Tr. 624-5. If the right amount of force is applied, and in the course of its application acts are committed which in normal times would amount to assaults or trespasses, the courts will regard the acts as justified and required by a state of public disorder, and will give no relief to their victims. Not merely so, but they will, as the case of *R.* v. *Pinney*, 5 C. & P. 254, shows, punish severely a magistrate who hesitates, in the course of a riot, to commit acts illegal in ordinary circumstances but necessary to the restoration of order. Martial law in this sense differs from martial law in sense (3) in the following important respects :—

(A) The amount of force of which it justifies the exercise is strictly limited to the necessities of the case.

(B) In respect of acts which purport to be justified by virtue of it, an aggrieved party can have recourse to the ordinary courts and will in a proper case obtain redress.

(C) It need not be "proclaimed."

We have already noticed the current superstition that such acts may not be done until "the Riot Act has been read." It may be, and often is, the duty of a magistrate to order troops to fire on a riotous crowd without previously reading the proclamation set out in the Riot Act. The effect of reading this proclamation is not to legalise an exercise of force which previous to such reading would be illegal, but simply to constitute any twelve rioters who remain assembled one hour after the reading a "felonious assembly."

On this part of the subject the student is referred to the statements of the Commissioners for enquiring into the disturbances at Featherstone in 1893 (C. 7234).

The Emergency Powers Act, 1920, is dealt with in Appendix D.

CHAPTER VIII.

TREASON, SEDITION AND OTHER OFFENCES AGAINST THE STATE.

Treason (*proditio*) denotes a betraying, treachery or breach of faith against the Sovereign (Stephen's Commentaries, vol. 4, p. 146).

The earliest statute on the subject is 25 Edw. III., st. 5, c. 2, which constitutes the following offences treason :—

1. Compassing or imagining the death of the king, queen, or their eldest son.
2. Violating the king's companion or the king's eldest daughter unmarried or king's eldest son's wife.
3. Levying war against the king in his realm.
4. Adhering to king's enemies in his realm by giving them aid or comfort in realm or elsewhere.
5. Counterfeiting the king's seal or money, or importing false money.
6. Slaying chancellor, treasurer, king's justices of the one bench or the other, justices in eyre (on circuit), justices of assize, and other justices assigned to hear and determine in their places doing their offices.

Compassing death of Sovereign.—The word "compass" imports design which must be manifested by an overt act. The following are overt acts according to Blackstone, viz. : providing weapons, conspiring to imprison king though not intending his death, assembling and consulting to kill king. Idle words are not now treason, though they were formerly deemed so, but they are high misdemeanours.

In arbitrary reigns people were punished for unpublished treasonable writings, *e.g.*, Peacham (afterwards pardoned) for an unpublished and undelivered sermon, and Algernon Sydney for treasonable unpublished papers found in his closet. Blackstone considers both Peacham and Sydney guiltless of treason, on the

ground that even if mere writing down were a sufficient overt act, such writing was in those cases clearly not relative to any previously framed design of murdering the King, but merely to speculative opinions of the authors.

Levying of war.—This includes not only levying of war to dethrone king, but levying war to reform religion, remove councillors, or redress grievances, as private persons cannot forcibly interfere in grave matters. . . . Resistance of the royal forces by defending a castle against them is levying war, and so is an insurrection with an avowed design to pull down all chapels and the like.

During Anne's reign *Damaree* and *Purchas* were convicted of treason for burning meeting-houses, the court being of opinion that the design was a general one against the State, and therefore a levying of war (1710), 15 St. Tr. 521.

Blackstone says that merely conspiring to levy war is not a treasonable levying of war, but that it constitutes compassing the king's death where it is pointed at the royal person or government.

Adhering to the king's enemies.—Pirates and robbers who invade our coasts are king's enemies, and so also are foreign enemies and our fellow-subjects in rebellion at home. Where, according to Blackstone, a rebel flees the realm, he is not an enemy within 25 Edw. III. (Hawkins, bk. I., ch. 17, s. 28).

Persons acting under duress as regards life or person cannot be convicted as traitors, provided that they leave the king's enemies at the first opportunity (Stephen, Commentaries, vol. 2, p. 146).

The facts of modern civilisation and the overshadowing power of present-day central governments make it extremely difficult for any individual to hope to approach a project of rebellion, or of "levying war against the king in his realm," with much prospect of success. Furthermore, attacks on the person of the monarch or other royal personages are extremely rare in England, a fact which has often been ascribed to the great freedom of English institutions. Be that as it may, we hear but little of charges of high treason of this nature (or indeed any other), and when *R.* v. *Lynch* came before the Courts, there had

not previously been a charge of high treason tried for sixty-two years. That case is important on the construction of that section of the statute of 1351 which deals with adhering "to the king's enemies in his realm by giving them aid or comfort in the realm or elsewhere." At the outset of the trial it was moved to quash the indictment on the ground that each count charged an adhering "without the realm," and therein disclosed no offence under 25 Edw. III., stat. 5, c. 2. The Court, while leaving the accused the right to move in arrest of judgment should he choose to do so, were of the opinion that the words in question were governed by *R.* v. *Vaughan*, 13 St. Tr. 525, and that the words "be adhering to the king's enemies in his realm" did not mean that the "accused person *being in the realm* has been adherent to the king's enemies *wherever they were*," to the exclusion of such a case as that before the Court. It is clear that so narrow a construction not only would enable an Englishman to engage with a foreign hostile power against his own country so long as he took care to remain abroad, but also ignores the words "or elsewhere" in the same sentence of the section. The case also decided that section 6 of the Naturalization Act, 1870 (c. 14), does not enable a British subject to become naturalized in an enemy State in time of war and, further, that the very act of purporting to become naturalized under those circumstances constitutes an overt act of treason (*R.* v. *Lynch* (1903), L. R. 1 K. B. 444).

In *R.* v. *Casement*, [1916] 2 K. B. 858, it was decided that a man may adhere to the king's enemies and be found guilty of treason whether the act complained of was committed within or without the realm. In the case of *R.* v. *Ahlers* (C. C. A., [1915] 1 K. B. 616) the facts were as follows. The accused was German Consul at Sunderland and it was therefore part of his ordinary duty to give to compatriots assistance, monetary and otherwise. Ahlers on August 5, 1914, on the day after the outbreak of war, took steps to assist German subjects of military age to return home to fight in the German army. On August 5 an Order in Council was made under the Aliens Restriction Act, 1914, which limited the time of departure for alien enemies to August 11; of this accused knew nothing,

but, as he afterwards stated in his evidence, he believed he was acting in accordance with international law. The accused was indicted for treason and convicted of adhering to the King's enemies, but the conviction was quashed by the Court of Criminal Appeal on the ground that proof was wanting that in acting as he did he was not simply carrying out his duties and also that he was aware that he was assisting the King's enemies.

Slaying the chancellor, &c.—As the chancellor and judges represent the King in court, Blackstone considers them entitled to equal protection. However, attempted murder of the chancellor and judges in court is, according to the same authority, not treason, though murdering the lord keeper (in court) was. These technical treasons the criminal code commissioners consider should be turned into murder (*a*).

By 1 Anne, st. 2, c. 21, s. 3, endeavouring to deprive or hinder any person next in succession to the throne under the Act of Settlement from succeeding thereto, and maliciously and directly attempting same by any overt act, is treason (Stephen, vol. 4, p. 143).

By 6 Anne, c. 41, maliciously and directly by writing or print maintaining and affirming that any other person hath any right to the Crown other than in accordance with the Act of Settlement, or that Parliament has not power to make laws to bind the Crown and the descent thereof, is treason (*id.*, p. 149).

The compassing, or imagining or intending, either within the realm or without, of the King's death, destruction, or bodily harm tending to death or destruction; maiming or wounding, imprisonment or restraint of the King's person, his heirs and successors; and uttering or declaring any such treasonable intent by any overt act, is treason (36 Geo. III. c. 7, and 57 Geo. III. c. 6).

The punishment for treason is now death by hanging (Felony Act, 1870), or beheading (by 54 Geo. III., c. 146, s. 2), but formerly the traitor was hanged, drawn and quartered, after being dragged on a hurdle to the place of execution.

(*a*) For what was treason in medieval times the student is referred to Stephen's Commentaries, vol. 4, p. 143.

Treason cannot be committed against a King *de jure* who is not King also *de facto*.

According to Hale, a king who has abdicated is no longer protected by the law of treason.

Procedure in treason.—By an Act of Edward VI. two witnesses are necessary to a conviction for treason, but where there is more than one overt act the two witnesses may prove one overt act apiece.

The offence must be prosecuted within three years after its commission, save in the case of compassing the King's death (7 & 8 Will. III. c. 3).

Misprision of treason.—Misprision of treason is bare concealment thereof, as where there is an assent the offence is treason.

Treason-felony.— By 11 & 12 Vict. c. 12, if any person shall, within or without the realm, compass, imagine, invent, devise, or intend to depose the Queen, her heirs or successors, from the throne of the United Kingdom, or any of her Majesty's dominions, or to levy war against the Queen, her heirs or successors, within any part of the United Kingdom, in order to compel by force a change of counsels or measures, and in order to put any constraint upon either House of Parliament, or move any foreigner to invade the realm, or other part of her Majesty's dominions, and shall express such compassing, &c., by publishing any print or writing, or any overt act, such person shall be guilty of felony.

The maximum punishment is penal servitude for life, and if a person is indicted for treason-felony, and the offence turns out to be treason, such person may be convicted of treason-felony.

Every person accused of treason is entitled to be defended by counsel, and also to give evidence on his own behalf, just like any other person accused of crime can now do.

By an Act of the year 1870, no forfeiture of property is now entailed by a conviction for treason.

By 7 & 8 Will. III. c. 3, persons accused of treason can challenge thirty-five jurors; and by 7 Anne, c. 21, a panel of jurors can be demanded ten days before trial, a list of witnesses ten days before.

A copy of the indictment must also be furnished ten days before trial.

Inciting the King's soldiers to mutiny.—By 37 Geo. III. c. 70, s. 1, persons maliciously endeavouring to seduce the King's soldiers or sailors from their duty and allegiance, or to commit an act of mutiny or traitorous practice, are to be guilty of felony, and may receive a maximum punishment of penal servitude for life.

Sedition.—Sedition is the attempt to bring into hatred and contempt the person of the reigning monarch, or the government and Constitution of the United Kingdom as by law established, or either House of Parliament, or to incite his Majesty's subjects to attempt the alteration of any matter in Church or State (Criminal Libel Act, 1819, c. 8), or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst his Majesty's subjects, or to promote feelings of ill-will and hostility between different classes (Strode's Legal Dictionary, *sub tit.* "Sedition").

In the case of *R.* v. *Burns and others* (1886), 16 Cox, 355, tried at the Central Criminal Court, Mr. Justice Cave stated that "sedition embraces everything, whether by word, deed or writing, which is calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the government and law of the empire."

A meeting lawfully convened may become an unlawful meeting if, during its course, seditious words are spoken of such a nature as to produce a breach of the peace, and those who do anything to assist the speaker in producing upon the audience the natural effect of their words, as well as those who spoke the words, are guilty of sedition (*R.* v. *Burns*, *supra*).

Criminal slander.—It is a misdemeanour to slander any member of either of the two legislative chambers, when the defamatory words in question are published and would be libellous supposing they were written concerning a private individual touching his calling in life (Odgers on Libel, p. 493).

Ribald and insulting verbal abuse of either of the legislative

chambers as a body or of Parliament generally, are also criminal misdemeanours.

One may criticise either House, or Parliament generally, and great latitude is permitted; but insulting language calculated to inspire contempt is criminal. The same remarks apply to published verbal abuse of High Court judges (*id.*, p. 493).

Official secrets.—An old Official Secrets Act has been repealed and is now replaced by the Official Secrets Act, 1911, which provides for the prosecution of persons who for any purpose prejudicial to the State approach a place thereby defined to be a prohibited place, or who make sketches of such prohibited place, or take copies of any prohibited document or who communicate any sketch, documents or information, &c., or who receive such sketch, &c. Such persons are by virtue of the statute guilty of a felony.

Persons again are guilty of a misdemeanour under the Act who carelessly part with any sketch, documents or information, &c., to any unauthorised person, or who retain sketches, plans or documents or information too long after the time has arrived for handing them over. Attempts to commit the above offences are to count as the commission of such offences. Persons are to be guilty of a misdemeanour, again, who either harbour spies or wilfully refuse to give information to a police superintendent respecting spies where they have harboured spies.

A prohibited place includes any arsenal, munition works, camp, fort, workshop or any place where munitions, &c., are made. By the Official Secrets Amendment Act, 1920, the following offences have been made punishable :—

(1) Wearing an unauthorised uniform for the purpose of gaining admission to a prohibited place.
(2) Making false declarations, oral or written, with the same object.
(3) Forging passports, passes or permits.
(4) Pretending to be a government official or in the employ of one.
(5) Communicating with foreign agents, *i.e.*, persons authorised by foreign powers, with a view to doing acts prejudicial to the State.

(6) Interfering with the police or the military with such purpose. The Act empowers the Government to intercept telegrams. Receivers of letters are to be registered and they are required to give information on demand as to their customers, and it appears to be an offence to give receivers of letters false information.

No member of the public is to refuse to give information respecting a suspect spy if asked to do so by certain specified police officials.

CHAPTER IX.

ALLEGIANCE—NATURALIZATION—EXTRADITION—FOREIGN JURISDICTION OF CROWN—FUGITIVE OFFENDERS.

What allegiance is.—Allegiance has been defined as the "natural and legal obedience which every subject owes to his Prince" (*Termes de la Ley*) in exchange for the protection extended by the Prince to the subject (Blackstone, I., p. 369). In addition, however, to subjects who owe permanent or natural allegiance, there are those who owe local allegiance, namely, aliens resident in the dominions of the Prince so long as they reside there. Allegiance is correlative with treason, in the sense that treason can only be committed against the Sovereign by a person owing allegiance to him, either natural or local. Allegiance is, moreover, due to the *de facto* Sovereign (*Calvin's Case* (1608), St. Tr. 559; Thomas, 50), even though he be an usurper.

(The case of Calvin was formerly of great constitutional importance. James I. was anxious to emphasise the fact that allegiance was a personal tie binding the subject to the Sovereign, and that English and Scotch subjects should be mutually naturalized. This idea was begotten of the idea of divine right. The Commons opposed James in the matter, and two collusive actions were therefore brought. Land was bought in the name of John Calvin, an infant. Calvin was a *post natus* (*i.e.*, born after the accession of James I. in 1603) and claimed as such *post natus*. In the first action the land was claimed for Calvin as a natural-born subject of the King, and in the second action the title deeds were claimed in Chancery. The defendant claimed that Calvin was an alien. . This plea was demurred to, and in the hearing of the demurrer the court held that it was bad. Thus the case terminated in Calvin's favour.)

And when the Crowns of two countries which have formerly been united are severed, allegiance automatically reverts to the

place of birth. Thus, when William IV. died, Hanoverians ceased to be British subjects (*Stepney Election Petition*, 17 Q. B. D. 54).

British subjects and aliens.—All persons are either :—

(1) British subjects; or

(2) Aliens.

(1) British subjects are either :

(A) Natural born; or

(B) Naturalized; or

(C) Have acquired British nationality owing to a British conquest or cession of territory to Great Britain or, if a woman, by marrying a British subject.

The last clause includes denizens.

(2) Aliens are either :

(A) Friendly aliens; or

(B) Enemy aliens.

Both of these classes, so far and so long as resident in the British dominions, owe local allegiance.

1. *British subjects.*

(A) *Natural born.*—By the British Nationality and Status of Aliens Act, 1914 (c. 19) (which codifies and to some extent modifies the pre-existing law), s. 1, the following persons are deemed to be natural-born British subjects :—

(i.) Any person born within his Majesty's dominions and allegiance.

(ii.) Any person born out of his Majesty's dominions whose father was a British subject at the time of that person's birth, and either was born within his Majesty's allegiance or was a person to whom a certificate of naturalization had been granted (a).

(iii.) Any person born on a British ship, whether in foreign territorial waters or not.

But nothing in this section affects the status of any person born before the Act comes into operation. Such persons are subject to

(a) Or, by the Act of 1918 (c 38), had become a British subject by reason of any annexation of territory, or was at the time of that person's birth in the service of the Crown.

the pre-existing law, which is not substantially very different. One difference which may be noted is that before the Act of 1914, not only the children of a male British subject born abroad, but his grandchildren so born were British subjects (see 7 Anne c. 5, 4 Geo. II. c. 2, and 13 Geo. III. c. 21, which Acts perhaps applied only to Protestants).

By the law of nations the children of ambassadors born abroad retain the nationality of their father.

(B) *Naturalized British subjects.*—At common law no alien could by any voluntary act become a British subject, nor could any British subject became an alien (*Nemo potest exuere patriam*) (see *Fitch* v. *Weber*, 6 Hare). Up to 1844 private Acts of Parliament were from time to time passed naturalizing individual aliens. Since that time the joint effect of a number of statutes (*b*)

(*b*) The most important of these Acts was the Naturalization Act, 1870, which, though repealed by the Naturalization Act, 1914, still affects the status of many persons born previous to the later statute coming into force, and to which such statute does not apply. Under this Act aliens were permitted to hold land in the United Kingdom but not outside its limits. Descent could be traced in future through an alien, but no alien was to own a British ship or any share therein, or to exercise the Parliamentary or municipal franchise, or hold any office either municipal or Parliamentary, or be a member of either House. British subjects were to be allowed to forfeit their nationality by becoming naturalized in a foreign State or, when applicable, making a declaration of alienage. On obtaining a certificate of naturalization and taking the oath of allegiance to His Majesty a person could obtain local naturalization in a British Dominion, such certificate giving him all the privileges of a British subject there. In *R.* v. *Francis, Ex parte Markwald*, [1918] 1 K. B. 617, the applicant, born in Germany, migrated to Australia, where he obtained naturalization under an Australian Naturalization Act of 1903. During the war he was resident in England and was interned for non-compliance with an order as to registration of aliens. It was held that neither the certificate of naturalization nor the taking of the oath of allegiance created a sufficient tie to make him a British subject as regarded the United Kingdom (see also *Markwald* v. *Att.-Gen.*, [1920] 1 Ch. 348). Under the Act of 1870 an alien, by procuring a certificate of naturalization, obtained all the advantages of British nationality provided that the oath of allegiance was taken. No person was to be naturalized unless he had resided for five years in the United Kingdom or had been in the service of the Crown for the like period. All persons born within British territory were to be British subjects natural-born of His Majesty. The infant children of a naturalized parent living with him or her became British subjects, but on attaining twenty-one they could renounce British nationality by making a declaration of alienage.

No person during war can be naturalized in a foreign State or make a declaration of alienage (*R.* v. *Lynch*, [1903] 1 K. B. 444; *Ex parte Frey-*

is to enable any alien complying with certain conditions to apply for, and in suitable cases to obtain, a certificate of naturalization. A person obtaining such a certificate enjoys, so long as it is in force, to all intents and purposes the full political and civil status of a natural-born British subject (4 & 5 Geo. V., c. 17, s. 3 (i)). The application must be made to a Secretary of State, who before granting a certificate must be satisfied (i) that the applicant has resided in his Majesty's dominions or has been in the service of the British Crown for not less than five years; (ii) that he is of good character, and has an adequate knowledge of English; and (iii) that he intends, if his application is granted, to reside in his Majesty's dominions or to enter or continue in the service of the Crown.

The five years' residence in condition (i) must be five years within the last eight years preceding the application. The last year's residence before the application must be in the United Kingdom. The other four may be in the United Kingdom or elsewhere within his Majesty's dominions.

As the law stood before 1914 a British colony could, in certain cases, naturalize an alien so as to make him a British subject within that colony. The Act of 1914 has, in this respect, made an important innovation. Section 8 (i) of the Act provides in effect that the Government of India and of any self-governing dominion may grant certificates in the same way and with the same effect as a Secretary of State, *i.e.*, can confer full imperial naturalization. A similar grant by the Government of any of the other British possessions must be confirmed by the Secretary of State.

No certificate takes effect until the applicant has taken the oath of allegiance (section 2 (4)).

The Secretary of State may at his discretion grant a certificate to any person with respect to whose nationality as a British subject doubt exists.

An alien applying for a certificate may ask that any infant child

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berger, [1917] 2 K. B. 129; *Gschwind* v. *Huntington*, [1918] 2 K. B. 420). The old common law rule of a woman changing her nationality by intermarriage with a foreigner was expressly recognised, with a proviso that she could resume British nationality on becoming a widow. The Secretary of State was also empowered to give a certificate of naturalization in a doubtful case.

of his may be included in the certificate, and if the request is granted such child is naturalized as from the same date as the parent, subject to the child's right on attaining majority to revert to its parent's earlier nationality by a "declaration of alienage."

A wife's nationality follows that of her husband. Hence the wife of a natural-born or naturalized British subject is herself a British subject. She may, however, if he ceases to be a British subject, herself remain one by making a declaration. And the Act of 1918 provides that the British-born wife of an enemy alien may on making a declaration of her desire to resume British nationality be naturalized (*c*).

The Act of 1914 repeals section 3 of the Act of Settlement, whereby naturalized aliens are disqualified from holding certain offices.

The British Nationality and Status of Aliens Act, 1918, has restricted the grant and facilitated the revocation of certificates of naturalization: (1) *As to grant*, section 3 provides that no certificate shall for a period of ten years after the war be granted to any subject of a country which at the time of the passing of the Act was at war with his Majesty. Exceptions are, however, made in favour of such persons if they have served in his Majesty's or the Allied forces during the war, or were at birth British subjects, or are members of a community or race known to be opposed to the enemy governments. (2) *As to revocation.* Before the Act of 1914 a certificate of naturalization was irrevocable. That Act enables certificates to be revoked if obtained by fraud or false representations. The 1918 Act, however, provides that certificates may be revoked on a number of additional grounds, *e.g.*, when the Secretary of State is satisfied

(*c*) In the case of *Fasbender* v. *Att.-Gen.*, [1922] 2 Ch. 850, where a natural-born Englishwoman married in Germany a German between the date of the Armistice and the coming into force of the Treaty of Versailles, the Court took the view that her property could be charged as enemy property under the Treaty. The above rule also applies where a British subject becomes naturalized in a foreign State during a war (*Re Chamberlain's Settlement*, [1921] 2 Ch. 533 The question to be decided was whether Chamberlain was a German national within the meaning of the Treaty of Versailles, and the Court held that he was). From the cases above given it may be inferred that where a British subject becomes naturalized in a foreign State during war he reaps all the disadvantages of the nationality which he assumes while retaining all those of the nationality which he discards.

that the holder of the certificate has shown himself disloyal to his Majesty, or has traded with the enemy during any war, or has been sentenced to not less than twelve months' imprisonment within five years of the grant of the certificate, or was not of good character at the date of the grant—but in the last three cases the Secretary of State must further be satisfied that the continuance of the certificate is not for the public good (section 1, 1918 Act).

The Act also provides (section 3 (i)) that certificates granted during the war to any person who at, or before, the grant was the subject of an enemy power shall be reviewed by a committee and withdrawn if the committee so recommend.

Denizens.—The status of denizens is not affected by the foregoing Acts. By letters of denization the Crown can confer on a foreigner the majority of the rights of citizenship. A denizen can hold land and vote at a parliamentary election (*Solomon's Case* (1869), 2 Peck. 117), but he cannot sit in Parliament or be a privy councillor, or hold any office of trust under the Crown (see Chitty, p. 15). Letters of denization are hardly ever now granted.

Loss of British Nationality.—A British subject could not at common law, but may now, become naturalized in a foreign country, and any person so doing ceases to be a British subject. Naturalization, however, in a country with which his Majesty is at war not only amounts to an overt act of treason but is probably for civil purposes a mere nullity (*R.* v. *Lynch*, *ante*, p. 89).

A person can also in some cases renounce British nationality by declaration of alienage; *e.g.*—

(1) An infant child of a foreign father, naturalized at the same time as its father and at his request, may do so on attaining majority (*d*).

(*d*) By section 12 of the Naturalization Act, 1914, the infant children born abroad of a person who ceases to be a British subject lose British nationality where by the law of the country of their father's adoption they become the subjects of such country; but where the child is born in England and the father afterwards loses British nationality the child remains a British subject.

(2) A person who, though born out of his Majesty's dominions, is deemed to be a natural-born British subject can make a declaration of alienage (apparently at any time after majority) (*e*).

(3) Where a convention to that effect exists between his Majesty and a foreign State, persons of foreign parentage from that State who have become naturalized British subjects can renounce British nationality by declaration of alienage.

As to history and status of aliens, see p. 39 *et seq.*, *ante*.

By the Naturalization Act, 1918, the citizens of a State conquered by England become British subjects, and by the Naturalization Act, 1922, any person born abroad whose birth has been registered at a British consulate within twelve months after such birth, or under special circumstances, by leave of the Secretary of State, within two years after such birth, or any person born after January 1, 1915, who would have been a British subject if born before that date and whose birth is registered before August 1, 1923, is a British subject.

Where during marriage the husband loses British nationality it is competent to the wife to retain her status by making the declaration prescribed by the Act. By the laws of certain States certain persons born therein possess no nationality—*e.g.*, the bastard children of an alien woman born in Germany—and again a person has no nationality where he is denaturalized in his country of origin and fails to obtain naturalization in his country of choice. It is open to argument, therefore, that where a British woman marries a man of no nationality she herself becomes stateless. In *Ex parte Weber*, [1916] A. C. 421, Phillimore, L.J., expressed the opinion that no person could, as regards English law, possess no nationality, but in *Stoeck* v. *The Public Trustee*, [1921] 2 Ch. 67, Russell, J., held to the effect that statelessness was a legal possibility.

(*e*) In *Carleback's Case*, [1915] 3 K. B. 716, it was decided that the children of a naturalized British subject born outside British territory were aliens according to the tenets of international law. Where a State is conquered by England during a war the citizens of that State do not lose their nationality until the war is over, and this is probably because the title to it is doubtful; but it is questionable whether this rule holds good in English law. In the case of *Gout* v. *Cimitian*, [1922] A. C. 105, where a native of Turkey was "*ordinarily resident*" in Cyprus at the time of the annexation, the Court held that he was a British subject for this reason, though the war continued for a long time after the annexation. The Court held that Cimitian became a British subject by virtue of the Order in Council annexing Cyprus to the British Empire.

Extradition.—Certain Acts, called the Extradition Acts, which are now four in number, provide that when the Crown makes a treaty by virtue of these Acts with a foreign State, it (the Crown) may, subject to certain restrictions and formalities, hand over to any given foreign State any persons (whether foreigners or British subjects) who have been found guilty of any offence covered by the Extradition Acts or any of them. The foreign State in return undertakes to surrender to Great Britain persons who have committed extraditable crimes in British territory.

The English law will not allow a man's surrender for a political offence (Extradition Act, 1870, s. 8) (*f*), and further provision is made that, subject to certain reservations in the Act specified, no person is to be surrendered or tried for any crime other than the crime in respect of which his extradition was demanded. The Act of 1870 further enables the Crown to make Orders in Council directing that the Extradition Acts shall apply to any given State. This Order in Council, furthermore, shall be deemed conclusive evidence that the arrangement therein referred to complies with the provisions of the Act, and that the Act applies in the case of the foreign State mentioned in the Order, and the validity of the Order is not to be questioned.

The Act of 1870 provides for the question of surrender being tried by a Bow Street magistrate, who is styled in the Act a "police magistrate."

When extradition is desired, accused can be arrested—

(1) By police magistrate's warrant issued on the order of the Secretary of State.

(2) By warrant of a justice of the peace issued upon information on oath in the ordinary way.

It is the duty of a justice who issues a warrant under the Act of 1870 to send the prisoner before a police magistrate.

When a police magistrate commits a prisoner for surrender, such surrender cannot take place for fifteen days, or such further time as a *habeas corpus* application (if applied for) may occupy (Extradition Act, 1870, s. 11).

(*f*) In *Re Castioni*, [1891] 1 Q. B. 149, a native of Canton Ticino, in Switzerland, during an insurrection committed murder, and escaped to England; and he was not surrendered, because the offence was a political one.

Section 12 provides that if a fugitive criminal is not conveyed out of the kingdom within two months after committal for surrender by the police magistrate, or if a writ of *habeas corpus* is issued after the decision thereon, any superior court judge may upon the prisoner's application, and upon proof that the Secretary of State has had reasonable notice of such application, order the discharge of the prisoner from custody.

If the fugitive is not discharged, he is surrendered under the warrant of the Secretary of State.

Foreign jurisdiction.—The foreign jurisdiction of the Crown is not easy to deal with in an elementary treatise. It rests primarily on the fact that when a British subject goes abroad he still remains a British subject, though he may owe temporary allegiance in the country where he is residing.

In the first place, if a British subject commits certain crimes (*g*) in foreign territory, *e.g.*, murder or manslaughter, he may be tried and punished for them on his return to England, though, in many cases also, he may be tried and punished in the country where he committed the crime.

In the second place, special provision has to be made for the protection of the persons and property of British subjects abroad. As regards civilised countries, this is provided for by the appointment of consuls, whose duty it is to help British subjects who are charged with crime abroad or would otherwise get into difficulties. Of course, if the foreign country persists in doing wrong to a British subject, the only remedy is by way of diplomatic representation. Diplomatic agents and consuls have notarial powers, and under certain restrictions have the power to celebrate marriage between British subjects.

Thirdly, in the case of barbarous countries, or countries where

(*g*) *Trial for Offences Committed Abroad.*—Persons owing allegiance both natural and local may be tried in English Courts for (*inter alia*) the following offences: (1) treason; (2) murder; (3) manslaughter; (4) bigamy; (5) offences against the slave trading and kindred Acts; (6) offences by British *subjects on the high seas*; (7) piracy; (8) offences against the Foreign Marriages Acts; (9) offences against the Official Secrets Acts; (10) offences against the Foreign Enlistment Act; (11) offences against the Maritime Conventions Act; (12) misdemeanours committed in the Colonies and abroad by governors and certain other officials triable in the King's Bench Division.

there is no regular government, foreign jurisdiction is exercised on a much more extensive scale, and its exercise is regulated by the Foreign Jurisdiction Act, 1890, which begins by reciting that by treaty, capitulation, grant, usage, sufferance and other lawful means, the Crown has jurisdiction within divers foreign countries. The Act then proceeds to empower persons authorised by warrant from the Crown to send for trial, at some specified British court, persons charged with offences in the particular foreign country named. It also authorises the Crown, by Order in Council, to create courts of civil and criminal jurisdiction in the foreign country and to regulate the procedure of these courts, and to define the persons who should be subject to their jurisdiction. For example, consular courts of civil and criminal jurisdiction have been created in Persia by an Order in Council of 1889. So, too, consular courts have been created in Morocco, with a curious concurrent and appellate jurisdiction in the Supreme Court at Gibraltar.

Fourthly, reference must be made to the Foreign Enlistment Act, 1870, which regulates the conduct of British subjects during the existence of hostilities between foreign States with which his Majesty is at peace. That Act punishes British subjects who accept commissions or engagements in the military or naval service of any foreign State which is at war with any other foreign State with which we are at peace.

The Act further punishes the building of ships for any foreign country which is at war with any friendly State, and penalises any persons who, in British dominions, prepare or fit out any naval or military expeditions to proceed against the dominions of any friendly State.

(As to foreign jurisdiction generally, see Hall's Foreign Jurisdiction of the Crown.)

Fugitive Offenders Act.—As to the surrender of offenders as between the United Kingdom and its colonies, see the Fugitive Offenders Act (44 & 45 Vict. c. 69).

PART III.

The Crown.

CHAPTER X.

TITLE TO THE CROWN.

Under the Saxons the title to the Crown was by election, but generally, where he was fit to govern, the eldest son of the deceased King was elected if of full age. Under our common law the title to the Crown may be said to have been hereditary, the nearest male feudal heir being chosen. But (1) where the Throne devolved upon a female the eldest female and her issue was preferred. The first Queen Regnant was Mary, who came to the Throne under Henry's VIII.'s will, sanctioned by an Act of Parliament, and, to allay all possible doubts as to her powers, she being a married woman, a statute (1 Mary I., c. 1) was passed conferring upon her as Queen Regnant all the powers of a King; and (2) the ancient legal rule relative to the exclusion of the half-blood never applied to the title to the Crown (cf. Halsbury, vol. 6, p. 320).

The first four Norman Kings were elected, and Henry II., a grandson of Henry I. in the female line, succeeded owing to a compromise after the civil war in that reign. Richard I. was the eldest surviving son of Henry II. John was the youngest son of Henry II., and is supposed to have murdered Arthur of Brittany—the son of Geoffrey, his elder brother—in order that he might lay claim to the Dukedom of Normandy, then annexed to the English Crown. Hereditary descent was in John's time not strictly recognised, but the idea was growing owing to the close association of the Crown with the land, the Norman kingship, unlike the Saxon, being territorial rather than personal.

This may have been the reason for the murder of his nephew attributed by historians to John.

It is a significant fact that Henry III., John's infant son, was chosen as his successor, though at the time of his accession he was only nine years of age. Edward I. was the son of Henry III. and, though abroad in Palestine at his father's death, he was proclaimed King *jure hæreditario*.

Edward II. was the eldest and only son of Edward I., and Edward III. was Edward II.'s eldest son. Richard II. was the grandson of Edward III., being the son of Edward the Black Prince, the eldest son of Edward III.

Richard II. was deposed and was succeeded by Henry IV., the son of John of Gaunt and grandson of Edward III., who succeeded to the Throne under an Act of Parliament entailing the Crown on him and the issue of his body. Henry V. and Henry VI. succeeded under the same parliamentary entail. Edward IV. succeeded by conquest and by pedigree, which was afterwards fortified by statute, and Richard III., Edward IV.'s brother, is credited with usurping the Throne after murdering—a fact which is open to doubt—the two sons of Edward IV.

Richard III. based his right of succession on the fact that an alleged precontract of marriage of Edward IV. rendered his issue by Elizabeth Gray bastards.

Henry VII. had no claim to the Crown whatever save as a descendant of Edward III., but he was the recognised head of the Lancastrian party and the winner of the Battle of Bosworth.

There was, moreover, no legitimate heir of the House of Lancaster, but Henry nevertheless procured from Parliament a statutory entail on himself and the issue of his body.

Henry VIII. was succeeded under a parliamentary entail by Edward VI., his son by Jane Seymour.

Edward VI. died in infancy and was succeeded by his half-sister Mary, and, after her death, by his half-sister Elizabeth, both of them succeeding under a statute of Henry VIII., subject nevertheless to restrictions and conditions made by Henry VIII.'s will. Mary and Elizabeth both died without issue. Henry VIII., acting under a statutory power, had devised the Crown, on failure of issue of his three children, to the heirs of the body of

his younger sister Mary, Duchess of Suffolk, ignoring the prior claim of his elder sister Margaret.

James I., having got the ear of Elizabeth's Council, was proclaimed King, though Henry VIII.'s will was indisputable. James I., however, sought a parliamentary title, and got it. Charles I. was the eldest surviving son of James I., and Charles II. and James II., as sons of Charles I., succeeded as lawful heirs. The Declaration of Rights declared that James II. had abdicated and that the Throne had thereby become vacant. The Crown was settled by Parliament on William III. and Mary during their joint lives and on the survivor of them during his or her life, remainder to the Princess Anne of Denmark and her issue, remainder to the issue of William III. In 1700 William III., having no issue, and Anne seeming likely to have no surviving issue, the Act of Settlement was passed settling the Throne on the Electress Sophia and the heirs of her body being Protestants.

The Electress Sophia was a daughter of Elizabeth who married the Elector Palatine of Hanover, and a granddaughter of James I. Sophia's son, George I., succeeded Anne under the Act of Settlement.

From the time of George I. to the present the succession has never failed, the legal heir under the Act of Settlement succeeding. Under the Act of Settlement any successor to the Crown who is a Papist, or who marries a Papist, is incapacitated. The successors to the Crown must also take the Coronation Oath and sign the declaration prescribed by the Bill of Rights. The successor to the Throne is to be in communion with the Church.

The words of the oath as taken before the Accession Declaration Act, 1910, were to the following effect :—

"Will you solemnly swear to govern the people of this realm according to the Statutes of Parliament agreed on and the respective laws and customs of the same?"

"A. I solemnly promise so to do."

"Will you to the best of your power cause law and justice in mercy to be executed in all your judgments?"

"A. I will."

"Will you to the best of your power maintain God's laws, the

true profession of the Gospel and the Protestant reformed religion established by law? And will you maintain and preserve inviolably the settlement of the Church of England and the doctrine, worship, discipline, and government thereof as by law established in England, and will you preserve unto the Bishops and Clergy of England and to the Church there committed to their charge all such rights and privileges as by law do or shall appertain to them or any of them? "

The King was also required to make a declaration against transubstantiation either at his first Parliament or at his Coronation (Bodley's Coronation of Edward VII., p. 438).

The form of the declaration, however, which was originally prescribed by the Bill of Rights and Act of Settlement, is now, by virtue of the Accession Declaration Act, 1910, as follows :—

" I do solemnly and sincerely in the presence of God testify and declare that I am a faithful Protestant and that I will according to the true intent of the enactments which secure the Protestant succession to the Throne of my realm uphold and maintain the said enactments to the best of my powers according to law " (Accession Declaration Act, 1910 (c. 29)).

CHAPTER XI.

THE ROYAL FAMILY.

The King.—The King is the chief officer of the State. He is an essential part of the legislature. Justice is administered in his name, and the process of his own courts, therefore, cannot be directed against him. The executive government of the country is carried on in his name and on his behalf, but what were formerly the personal prerogatives of the Sovereign have now become so largely the privileges of the executive that they can only be dealt with collectively as prerogatives of the Crown. As to purely personal privileges, see further Chitty's Prerogatives of the Crown, pp. 12 and 374; and as to the liability of the King's private estates to rates and taxes, see 25 & 26 Vict. c. 37, ss. 8, 9.

Queen Regnant.—The Queen Regnant has the same powers and status as a King (1 Mary I. c. 1).

Queen Consort.—The life and chastity of the Queen Consort are protected by the Statute of Treasons. The Queen Consort, though married, was always a *feme sole*, and could sue and be sued at common law without her husband being joined. She always could purchase property for herself, convey property, and grant leases, and the reason for this is that the King's time is so much taken up that he ought not to be troubled with his wife's business matters. Mr. Robertson says it is uncertain whether the Queen is bound by the Statute of Limitations. The Queen has her own Attorney and Solicitor-General; she pays no toll, neither can she be amerced in any court (Stephen, vol. 2, p. 459; Robertson's Suits by and against Crown, pp. 5, 6, 7). She is the King's subject, and is thus amenable to criminal process. She was formerly entitled to certain reservations out of the royal demesne lands, and to a perquisite called "Queen's gold."

It rests with the King whether he will have her crowned or not (*Queen Caroline's Case*, 1 St. Tr. (N. S.) 949).

On the King's death the Queen Consort becomes the Queen Dowager, and the statute relating to treason no longer applies to her.

Prince Consort.—There are four instances of Queens Regnant having been married. Philip and William III., who married respectively Mary I. and Mary II. These two enjoyed the title of King. Prince George of Denmark and the late Prince Albert were Prince Consorts. Prince Albert at State functions had a precedence next to the Queen allotted to him. He was accorded the title of Prince Consort by Letters Patent. He was made a British subject on taking the oath of allegiance and the oath of supremacy (Anson, vol. 1, p. 256; Stephen, vol. 2, p. 461; Todd, vol. 1, p. 195). He was allowed to attend Privy Council meetings, though he was never a Privy Councillor; but cf. Todd, vol. 1, p. 195).

The Prince of Wales.—The life of the King's eldest son is protected by the law of treason (Statute of Treasons).

When the King's eldest son is born he immediately becomes Duke of Cornwall if his father (or mother) is on the Throne. When he succeeds to the Throne, the Duchy of Cornwall immediately vests in his eldest son.

If the King chooses, and when he chooses, he can make his eldest son Prince of Wales and Earl of Chester by Letters Patent. The present Prince of Wales was made Prince of Wales by Letters Patent and a ceremony in addition.

The reigning Sovereign can control the custody and education of the children of his heir, and, according to the better opinion, the custody of all princes and princesses of the blood royal save the issue of princesses who have married into foreign royal families (see May's Constitutional History, vol. 1, p. 264). The chastity and life of the Princess of Wales during marriage are safeguarded by the Statute of Treasons (25 Edw. III. st. 5, c. 2).

Princes and princesses of the blood.—These royal persons take precedence of all peers and public officials. 31 Hen. VIII. c. 10

provides that nobody save the King's descendants shall presume to sit at the side of the Cloth of State in Parliament. This privilege, according to Stephen, extends to the King's brothers, nephews and uncles (Stephen's Commentaries, vol. 2, p. 468). Princes of the blood, till summoned by the House of Lords, are commoners.

By the Royal Marriage Act (12 Geo. III. c. 11), no descendant of the body of George II. (other than the issue of princesses married into foreign families) can lawfully marry without the royal consent signified under the Great Seal and declared in council, and all other marriages are void. All persons solemnizing such marriages, or who are privy and consenting thereto, are to incur the penalties of a praemunire. A descendant of George II. over twenty-five years of age may marry without the Sovereign's consent on giving twelve months' notice to the Privy Council, provided that no objection be taken by Parliament in the interim (cf. May's Constitutional History, vol. 1, p. 265).

CHAPTER XII.

THE ROYAL PREROGATIVE.

There have been numerous definitions of the word "prerogative." Blackstone says it means that pre-eminence which the King hath above all manner of men and out of the course of the common law in right of his royal dignity. It signifies, he continues, in its etymology from *prae* and *rogo*, something which is required, or demanded, in preference to all others. "It can only be applied to those rights and capacities which the King enjoys alone" (Blackstone, vol. 3; Chitty, p. 4).

Comyns' definition is as follows: "The King's prerogative comprises" all the liberties, privileges, powers and royalties allowed by the law to the Crown of England (Digest, vol. 7, p. 42).

Finch says "it is that law in the case of the King which is no law in the case of the subject" (p. 85).

The following definitions are also noteworthy:

"It extends to all powers, pre-eminencies and privileges which the law giveth to the Crown" (Co. Litt. 1, 90*b*).

"The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown" (Dicey, p. 420). This would seem to be the most satisfactory definition (*a*).

"That advantage which the Crown has over the subject where their interests come into competition by reason of its greater strength" (Hallam).

Bracton (*b*), speaking of pre-eminence, says: ***Rex est vicarius***

(*a*) Professor Dicey is here alluding to the official powers, as the personal privileges of the King are nowadays of less importance than formerly.

(*b*) Henry Bracton or Bratton was a priest and judge *temp.* Henry III. His famous Commentaries disclose his adherence to the dogmas of Azo of Bologna. According to Maine, a very considerable portion of his treatise savours of

et minister Dei in terrâ, omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo. The realm of the King is an empire, and no emperor is greater than the King.

The present position of the King as a person.—In theory and by strict law the King has very extensive powers. The conventions have, however, altered his position. After the Revolution the King was put on an allowance by the nation, out of which he had to maintain certain offices, while the control of the Army passed to Parliament. Before the Revolution the King and Council conducted the government, though the King was not bound, as now, to take the advice of his Ministers. Parliament could not prevent, as now, threatened mischief, but could only impeach the offender after the event.

After William and Mary's accession the prerogative, as altered by the Bill of Rights, outwardly remained *in statu quo*, but care was taken to avoid its abuse.

(The result of the Revolution was to establish gradually three main principles upon which our system of government now rests : (1) The Sovereign is irresponsible, but (2) Ministers are responsible to Parliament for the exercise of every prerogative, and (3) it is the right and duty of Parliament to enquire into the way in which Ministers exercise the prerogative and approve or condemn the mode of exercise.)

Recognition of these principles implies three duties binding on the three parties to the constitutional arrangement, viz. :—

" It is the King's duty to select Ministers enjoying parliamentary confidence (*i.e.*, a majority in the Commons) and to retain them so long as that confidence is continued " (Trail, pp. 5 *et seq.*).

It is the Ministers' duty to court parliamentary supervision over their public conduct, to submit all the acts of their policy, with no further concealment than the national interests may

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Roman doctrine, but Maitland, though he agrees with Maine to a certain extent, considers that for the most part his work is confined to decisions in the King's Courts. Clerical judges were in those days compelled to resort to Roman law, which Tindall, C.J., stated *et ipse* ... ed wisdom of ages, for guidance. (A full account of this ... does not bar the ... in Holdsworth, History of English law, 1st ed , vol. 2, ...

sometimes demand, to Parliament's judgment, and to accept Parliament's adverse opinion upon any important act of administration as an implied summons to resign (*ibid.*, p. 6).

These principles, which embrace the notion of Party Government, gradually began to assume shape after the Revolution.

By Party Government is meant the wielding of the prerogative by the leading party in the Commons, which is now under Cabinet control. We first hear of Party Government in the days of William III., who yielded to it at times, but kept foreign affairs under his control.

The idea gained more definite shape in Walpole's day, as Walpole retired on a hostile vote, and so did North later; but these were the only two cases of such resignations prior to the Reform Act of 1832.

Walpole was not the first Prime Minister, though he resembled one. He was invited by the King to join the Cabinet as the King's friend; he was not asked to form a Ministry or choose his colleagues. By sheer force of character he gained a leadership over his colleagues.

Pulteney, on being asked by George II. to form a Cabinet, only requested the filling up of three or four posts. The better opinion is that there was no Party Government in the modern sense till Pitt the younger came into power in 1782.

At the present day there are no longer two leading parties in the Commons, but there are groups embracing different views, and the man who commands the support of most groups has the best claim to be Premier.

The personal influence of the King declined in the reigns of George I. and George II. Neither of them could speak English well; they ceased to attend Cabinet meetings; and since then English Sovereigns have not found it expedient to attend them. The member of the Privy Council who sat in the chair when the King ceased to attend was the forerunner of the present Premier.

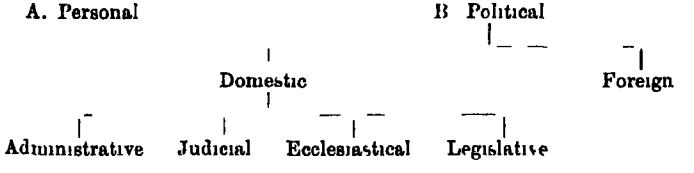
Classification of the prerogatives.—Blackstone divides the prerogatives into three kinds:—(1) Those regarding the royal character; (2) those [illegible] his adherence [illegible] the royal authority; and (3) those regarding the P[illegible] considerable po[illegible]

The first two of these were called by the feudal writers the *majora regalia*, and the third was called the *minora regalia*.

Blackstone's classification of the prerogatives is now obsolete, and so is his whole treatment of the subject. To read him one would suppose that the King is the main source of power in the State, an autocrat more absolute than Henry VIII. (In practice the powers exercised in his name are exercised by his ministers, and though his views when expressed are treated with respect, he cannot constitutionally, and would not try to, enforce them in the teeth of Cabinet opposition.)

Professor Maitland gives the following classification :—(1) Those prerogatives relating to the convening, proroguing, and dissolving Parliament and assenting to statutes; (2) powers relating to foreign affairs, war, peace, treaties, &c.; (3) powers of appointing and dismissing officers civil, military, executive, and judicial; (4) powers relative to the collection and expenditure of the revenue; (5) powers relating to the naval and military forces; (6) powers connected with the administration of justice; (7) powers connected with the maintenance of order; (8) powers connected with social and economic affairs, such as public health, education, trade, &c.; (9) powers connected with religion and the national Church.

It will, however, we think, be more convenient to classify prerogatives as follows :—



In conclusion, we will treat of the *minora regalia* or revenue prerogatives.

I. **Personal prerogatives.**—The personal prerogatives still exist, and to some extent inevitably overlap with the political. The principal ones are as follows : (1) the King can do no wrong; (2) the King never dies; (3) *Rex est vicarius et minister Dei in terrâ, omnis quidem sub eo est et ipse sub nullo, nisi tantum sub Deo*, (4) lapse of time does not bar the right of the Crown his

(5) where the title of the King and that of the subject clash, the King's title must be preferred; (6) the King is not bound by statutes unless named therein; (7) the King is never an infant.

(1) *The King can do no wrong.*—Professor Dicey says this means that the King is not liable for any act of his Ministers, but Ministers are liable for all royal acts.

No administrative act can be done by the King without the counter-signature of a responsible Minister. No man can plead the royal order as justification of an illegal act.

The maxim, says Broom, has a double meaning: (a) it means that the King in his personal capacity is not answerable to any earthly tribunal—neither can his blood be corrupted; for instance, if the King were before his accession attainted of treason, he would by succeeding to the throne be purged of all guilt; (b) that the prerogative of the Crown extends not to any injury, because, being created for the benefit of the people, it cannot be exercised to their prejudice: "*ergo*, it is a fundamental rule that the King cannot sanction an act forbidden by law: so from that point of view he is not above the law." The act is invalid if unlawful and the instrument of execution is obnoxious to punishment. As in affairs of State the King's Ministers are responsible for advice tendered to the King, or even for measures which might be known to emanate directly from the King, so may the agents of the Crown be civilly or criminally responsible for acts done by his command (Broom's Legal Maxims, p. 40). Not only can the King not do wrong, but he cannot think wrong.

When, therefore, by misinformation or inadvertence he invades the rights of a subject, as by granting a franchise (*i.e.*, a royal privilege in the hands of a subject) contrary to reason or prejudicial to the community, the law declares that the King has been deceived in his grant, and such grant is void.

Again, the Crown cannot in derogation of the rights of the public fetter the exercise of the prerogative which is vested in it for the public good; nor can it dispense with anything wherein the subject is interested, or make a grant repugnant to the common law or prejudicial to the interests of an individual (*ibid.*, 41).

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Even where the royal grant purports to be made *ex certa scientia et mero motu*, the same will be void where it appears that the King was deceived in his grant.

The King cannot by grant of lands create an estate unknown to the law, neither can he grant a peerage descending in a way unknown to the law, as peerage partakes of the nature of land in most respects (*Wilts Case*, p. 276, *post*; *Buckhurst Case*, p. 276, *post*).

A statute, however, though a royal act, is unimpeachable (*Macormick* v. *Grogan*, L. R. 4 H. L., p. 96).

Where the Crown recalls a grant the grantee from the Crown suffers (*Cumming* v. *Forrester*, 1 Jac. & W. 342). As regards patents, the Crown is said to be deceived where the invention turns out not to be a novelty, and every part of the patent is void. Up to the time of Edward I. it may be that actions lay against the King. There was a rumour that a writ was issued against Henry III. This is discredited by Pollock. Chitty apparently thinks that the King could be sued up to the reign of Edward I.

As to petition of right, see Chapter XIII.

2. *The King never dies.*—The King has the attribute of immortality. "Henry, Edward, and George may die, but the King survives them all. For immediately upon the decease of the reigning prince his kingship by act of law, without any interregnum or interval, vests in the King's heir." (Blackstone, vol. 1, p. 249).

"It is true that the King never dies, the demise is immediately followed by the succession. There is no interval; the Sovereign always exists, the person only is changed" (*per* Lord Lyndhurst in *Viscount Canterbury* v. *Att.-Gen.*, 1 Phil. 321).

As to the effect of the demise of the Crown on Parliament see p. 260. The title of the Sovereign is regulated by succession as well as descent, and therefore if land be given to the King "and his heirs," the word "heirs" means the successors to the throne.

Hence, if the King dies without issue male, his eldest daughter would take under a grant to the King and his heirs (see Grant on Corporations, p. 127). If land is given to the King and his

heirs and a new dynasty succeeds, the first King of the new dynasty will take the land granted (*ibid.*, p. 127).

It is a mistake to think that the theory of the continuance of the royal person is given effect to without qualification. In the case of *Att.-Gen.* v. *Kohler*, 8 H. L. 634, it was held that a Sovereign could not be held responsible to refund money paid to the Treasury by mistake in the reign of his predecessor.

4. *The King is God's minister on earth.*—Everybody is under him and he is under nobody but God.

The King's realm is an empire and no emperor is greater than the King. The King's blood cannot be corrupted. The King's style and title are as follows: "King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Defender of the Faith, and Emperor of India" (1 Edw. VII., c. 15).

4. *Nullum tempus occurrit regi.*—Lapse of time will not, as a rule, bar the right of the Crown to sue or prosecute, but the exceptions are now numerous. The right of the Crown to claim real property as against the adverse right of the subject is barred after sixty years (The Nullum Tempus Act (9 Geo. III., c. 16)).

Other statutes have also been passed barring the rights of the Crown to death duties after the period named in the statutes has elapsed.

Informations against usurpers of corporate offices must be exhibited within six years after the usurpation (32 Geo. III., c. 88).

Indictments for treason (cases of attempted assassination of the King excepted) must be found within three years after the committal of the crime (8 Will. III., c. 3). There are also numerous cases where criminal proceedings must be taken within a limited period.

Complaints on information before courts of summary jurisdiction must, as a rule, be laid within six months of the commission of the offence.

5. *Quando jus domini regis et subditi concurrunt jus regis præferri debet.*—When the right of the King and the subject conflict, the subject's right must give way to the King's. Thus,

where the King and a subject are joint owners, the King takes the whole.

Where the subject as judgment creditor has seized goods under a writ of *fieri facias*, and after this a writ of extent has been issued affecting the same property, the claim of the Crown under the writ of extent is preferred (Broom's Legal Maxims).

6. *The King is not bound by statute unless expressly named therein.* It is said, however, that a statute may bind the King by necessary implication as well as express language. The King is also supposed to be bound, though not named therein, by statutes for the public good, for the preservation of public rights, suppression of public wrong, relief and maintenance of the poor, advancement of learning, religion and justice, the prevention of fraud; statutes tending to perform the will of a grantor, donor or founder (*ibid.*).

The presumption, however, is against a statute binding the Crown or Crown property (*per* Alderson, B., in *Att.-Gen.* v. *Donaldson* (1842), 10 M. & W. 117).

The King's high officials are protected by this maxim. Thus, in *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178, it was held that the defendant was not liable for wrongful acts of his subordinates in carrying out the business of the Department.

By the Weights and Measures Act, 1878 (c. 49), persons having in their possession for use in trade untrue scales were liable to a fine. Nicholls, a baker and also a postmaster, had untrue scales belonging to the Government and used them for the purposes of his trade as a baker. An information having been laid against him under the Weights and Measures Act, a writ of prohibition was applied for, and the court held that the magistrates had no jurisdiction to hear the case, because the provisions of the Weights and Measures Act did not apply to scales which were Crown property (see *R.* v. *Kent Justices* (1890), 24 Q. B. D. 181). In *Hornsey Urban District Council* v. *Hennell*, [1902] 2 K. B. 73, the court held that where land had been acquired and occupied by a Volunteer Corps for military purposes and held under the Volunteer Act, 1863, and the Military Funds Act, 1892, and vested in the commanding officer of the corps for the time being, it is land owned and occupied for the purposes of

the Crown. The commanding officer, therefore, was not liable for expenses incurred by a local body under the Public Health Acts, for repaving the street.

7. *The King is never an infant.*—Royal grants and statutes assented to by an infant King are valid. Maitland says no provision is made by the law for the King being a minor, or from any other reason being incapable of fulfilling the duties of his office. The law holds the King always capable of transacting business. The custom, however, is to provide beforehand for a royal minority by statute.

These statutes are called Regency Acts, giving as they do a Regent limited powers of doing the work of the King, say till the latter is 18 years of age.

II. Political prerogatives.—Domestic.

Administrative prerogatives.—These consist of creation of peers; creation of corporations, a power now scarcely ever exercised; the appointment of Ministers and other government officials; the dismissal of Ministers and government officials; the headship of Army, Navy and Civil Service.

The King's signature is necessary for signing numerous appointments. He also signs numerous Orders in Council. Certain documents bear the Great Seal and the Lord Chancellor is responsible for affixing it.

Numerous documents are under the Royal Sign Manual and in all cases Ministers who countersign are responsible for the royal act.

Judicial prerogatives.—The King is the fountain of justice and general conservator of the peace of the kingdom. By the expression "fountain of justice" the law does not mean the author or originator, but only the distributor, of justice. Justice is not derived from the King as his free gift, but he is the steward of the public to dispense it to whom it is due; *ad hoc creatus est, et electus, ut justitiam faciat universis* (c), (d).

(c) The office of "cyning" was evolved from the office of heretog or war leader of the Teutonic classes mentioned in Tacitus. To stop the bloodfeud the heretog settled disputes when a man was killed, and took his "wite,"

The King is not the spring, but the reservoir, whence right and equity are conducted by a thousand channels to every individual. The original power of judicature (after the period of self-help—the bloodfeud period—had elapsed) was vested in society at large, but as it would be impracticable to render complete justice by the people in their collective capacity, nations have committed that power to selected magistrates, who, in England, were the kings. The King, therefore, has alone the right of erecting courts of justice, and hence it follows that all jurisdictions of courts are mediately or immediately derived from the Crown. Their proceedings run in the King's name (*e*).

In County Courts and in some other local courts the proceedings do not disclose on their face any connection with the King. In ancient times the Kings dispensed justice in court, but for centuries they have deputed this duty to their judges, to maintain the independence of whom the Act of Settlement provided that their commissions should be made not *durante placito*, but *quam diu se bene gesserint* (Blackstone I., ch. 7).

By 1 Geo. III. c. 23 it was provided that the judges should

the relations taking the "wer," according to the market price (wergild) of the deceased, which depended on his position. In cases of injury, to prevent a duel the heretog awarded a bôt (compensation), unless the offence was bôtless. Bôtless offences were the precursors of what were later known as crimes.

(*d*) The King formerly sat in Court as a judge, and took part in decisions, though he did not always actively interfere. In the Dialogus de Scaccario, that wonderful book written about the time of Henry II. by Fitzneale, Bishop of London, as to the workings of the Exchequer, we find these words: "in quâ [the Curia Regis] ipse [Rex] in propriâ personâ jura decernit." Dr. Bellot does not attribute to Coke the statement in his Reports where he is supposed to have said that no King since the Conquest decided cases personally in Court, and reminds us that there is considerable doubt as to whether Coke wrote the report in which the statement occurs. Henry I. may have decided cases, but this is doubtful (cf. Bigelow, Placita Normanica, p. 238). John, according to Langmead, personally decided a case in the Exchequer in the sixth year of his reign. Henry III. frequently sat with his judges in Westminster Hall. Instances are recorded of John, Henry III., Edward I., and Edward II. personally dealing with criminal cases. Edward IV. sat with his judges for three days to see how they did their work (Stow, Chron., p. 416), but the personal interference of the King with his judges was of infrequent occurrence, and Coke told James I. that though he could sit in Court he could not give an opinion.

(*e*) In criminal proceedings the King nominally prosecutes, and civil proceedings in the Superior Courts are commenced by the King, who summons the defendant.

be continued in their offices during good behaviour, notwithstanding any demise of the Crown (Chitty, p. 83). The King is restricted in his appointment of judges. Judges of the High Court must be barristers of at least ten years' standing. County Court judges must be barristers of seven years' standing; recorders, of five years. As to Lords of Appeal in ordinary see p. 280.

The King cannot determine any cause or proceeding save by the mouth of his judges, whose power, however, is only an emanation of the prerogative (Chitty). Courts of justice have gained a well-known and stated jurisdiction and their decisions must be regulated by certain and established rules of law (*f*). It necessarily follows that even our Kings themselves cannot, without Parliamentary sanction, grant any addition of jurisdiction to such courts, nor authorise anyone to hold them in a manner dissimilar to that established by the common law or statute law of the land. His Majesty cannot grant a commission to determine any matter of equity, but it ought to be determined in the Court of Chancery (now High Court of Justice), which has immemorially possessed a jurisdiction in such cases (Chitty, pp. 75 *et seq.*). The King cannot legally authorise any court in the United Kingdom to proceed contrary to English law (*ff*).

"Most indubitably the power of the King to erect new courts was exercised in the Middle Ages. Nothing was commoner. A distinction was drawn between common law and other courts. The King could not create a Court of Equity. Has the Queen nowadays power to create new courts? I believe we must say that it exists" (Maitland, p. 419). In the *Bishop of Natal's Case* (1864), 3 Moo. (N. S.) 152, the Court held as follows:—"Though the Crown by its prerogative may establish courts to proceed according to common law, yet it cannot create any court to administer any other law. It was also decided that, as no ecclesiastical tribunal or jurisdiction is required in a colony or settlement where there is no established Church, the ecclesiastical

(*f*) Rules of Courts, superior or inferior, are mostly instances of indirect legislation of Parliament, and have the force of statutes.

(*ff*) As regards colonial courts it would perhaps be more correct to say that the King cannot create any court contrary to English notions of right and justice, *e.g.*, permitting torture.

law of England cannot be treated as part of the law which settlers carry with them from the Mother Country."

Maitland considers that the prerogative as to the erection of courts is now obsolete, because (1) a court of common law would be so clumsy as to be comparatively useless; (2) the King cannot tax his subjects for the upkeep of courts he chooses to erect (cf. Maitland, p. 420).

Pardon.—Pardon is a part of the judicial prerogative (*g*).

The policy of pardoning public offenders has been questioned by Beccaria on the ground that clemency should shine forth in the laws and not in the execution of them. By convention the King only pardons on the advice of the Home Secretary. No pardon can be pleaded by way of defence to an impeachment of the Commons (Act of Settlement, 1700 (c. 2), s. 3), but the King may remit penalties esulting from the impeachment. Thus, three lords who were impeached and attainted after the Rebellion of 1715 were subsequently pardoned (Halsbury, vol. 6, p. 404).

Limitations on the prerogative of pardon.—Where the penalty of a præmunire has been incurred by the sending of a man in custody out of the kingdom contrary to the Habeas Corpus Act, 1879, the King cannot pardon (Halsbury, vol. 6, p. 404; Chitty, p. 92).

Where an offence affects the public only the King can, as a rule, pardon, but in many cases the maxim applies, *Rex non potest gratiam facere cum injuria et damno aliorum.* Thus the Sovereign is unable to pardon a public nuisance whilst it is still unabated (Bacon's Abridgment, *sub tit.* "Pardon"). Again, the King cannot pardon a libel or a slander, or remit a recognisance to keep the peace (Halsbury, vol. 6, pp. 406 *et seq.*).

When once a common informer had commenced a penal action, the King could not remit the penalty, as this would be calculated to prejudice the common informer. Now, however, by virtue of the Remission of Penalties Act (c. 32) penalties for

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(*g*) Pardon differs from dispensation, as pardon only relates to past transgressions, whilst dispensation concerns transgressions past and also future (cf. Maitland).

offences may be remitted by the Crown, though payable to parties other than the Crown.

By 13 Rich. II., st. 2, c. 1, no pardon for treason, murder, or rape shall be valid unless the offence be particularly specified therein, and particularly in murder it shall be expressed whether it was committed by lying in wait, assault, or malice prepense.

Formerly the pardon of a principal offender enured for the benefit of the accessory, but this is no longer the case. No fee or stamp is chargeable for a pardon. A pardon may be pleaded in bar to an indictment, or after judgment in bar of execution (Archbold, Criminal Pleading).

It must be pleaded at the first opportunity for pleading it, for if the prisoner, who can plead pardon, pleads "not guilty," he is deemed to have waived the pardon and cannot avail himself thereof in arrest of judgment (*R.* v. *Norris*, 1 Rolle, 297).

By a statute of Henry VIII.'s reign the prerogative of pardon was vested in the Sovereign to the exclusion of the Lords. Pardon is absolute or conditional, and it is frequently conditional on the enduring of another sentence. Again, where a man has undergone the sentence awarded him by the law he is constructively pardoned. The effect of a pardon is to blot out the offence and to reinstate the person pardoned in his former position. This is illustrated by such a case as *Hay* v. *The Tower Division Justices* (1890), 24 Q. B. D. 561. One Hay was convicted of felony and then pardoned. A statute provided that no convicted man could for ever be licensed to sell spirits. The court held that as Hay had been pardoned he could be licensed and hold a public-house.

Enduring a sentence operates as a pardon. In *Leyman* v. *Latimer* (1876), 3 Ex. D. 15, the plaintiff, who was editor of a paper called *The Advertiser*, sued the defendant in libel for describing him as "a felon editor." Leyman had been guilty of felony and sentenced to twelve months' hard labour, and had served his sentence. The court held that the defendant had libelled the plaintiff.

Baron Cleasby, however, made the following remark in his judgment, "It is not necessary to decide what would have been

the result if defendant had only said of the plaintiff, 'he is a convicted felon'."

The reason for the decision in *Leyman* v. *Latimer* was as follows: By 9 Geo. IV. c. 32, s. 3, where any offender shall be convicted of any felony not punishable with death and shall undergo the punishment awarded, such undergoing of punishment shall have the same effects and consequences as a pardon under the Great Seal.

Pardons may now be under the Sign Manual as well as the Great Seal (Halsbury, vol. 6, p. 404, *et seq.*).

The King may pardon a clerical offender, thus absolving him from all consequences of an ecclesiastical offence; and by 55 & 56 Vict. c. 32, s. 1, where a clergyman is convicted of any offence which would render him liable to deprivation or loss of preferment, and such clergyman receives the royal pardon before the institution of another clergyman, the bishop shall, within twenty-one days after receiving notice in writing of such pardon, again institute him and cause him to be inducted into the preferment without any fee (Clergy Discipline Act, 1892 (c. 32), s. 1, sub-s. 2).

The King as arbiter of commerce.—As protector of commerce the King alone possesses the power of creating markets and fairs, nor can anyone claim them but by royal grant or prescription, which presupposes such grant. This prerogative is now unimportant as it has been superseded by statute.

The King as the fountain of honour.—The Crown alone can create and confer dignities and honours. The King is not only the fountain, but the parent of them. For further information see Chitty, p. 6.

Ecclesiastical prerogatives.—See *post*, Chapter XIV.

Legislative prerogative.—The relations between the Crown and Parliament are dealt with at length in Chapter XXV., *infra*.

The King has power at common law to legislate for conquered and ceded colonies until he, without express reservation of his rights, sanctions a Constitution. He has also statutory powers

of legislating by Orders in Council for settled colonies (see p. 179).

Further legislative powers as to certain mandatory colonies have been vested in the Crown under the Covenant of the League of Nations and the statute sanctioning it. As to legislative powers of the King as head of the Church, see p. 154.

Foreign prerogative.—Issue of letters of marque and reprisal.—The laws of nature and nations vest in every power a right to make reprisals and adopt a system of fair retaliation for the aggressions of another community. Where a nation manifests general hostility towards another by unauthorised attacks and satisfaction is denied and explanations are evaded, it is for the King alone to authorise his subjects to retaliate.

Such authority was in old days conferred upon English subjects aggrieved by foreign aggression, by means of "letters of marque and reprisal," which were commissions to fit out privateers. Letters of marque are now obsolete, since England subscribed to the Declaration of Paris, 1856, whereby privateering was abolished.

Right to make war and peace.—As representative of his people and as executive magistrate the King possesses the exclusive right to make war or peace, either within or out of his dominions, and the Constitution leaves it to the King's discretion to grant or refuse a capitulation or truce to an enemy.

In the proclamation of war it was not unusual expressly to permit enemy subjects to remain in British dominions if they behaved peaceably.

As incident to the prerogative of declaring war the King has assigned to him the management of the war. *Ergo*, the King, as head of the Army and Navy, can order their movements, regulate their internal arrangements, or diminish or increase their number. The King is also solely entitled to erect forts and other places of strength. Unless Parliament permits it, the keeping up of a standing army in time of peace is forbidden by the Bill of Rights (1 Will. & M., sess. 1, c. 1). The Army is kept up by annual legislation, and the Army Act permits the trial of military offences by court-martial, according to articles framed

by his Majesty. The King has a right to require the personal service of every man able to bear arms in case of a sudden invasion, and the allegiance due from the subject renders it incumbent on him to assist his Sovereign on such occasion.

As regards seamen and seafaring men the King may even in time of peace compel them to enter the Navy by forcibly impressing them.

This prerogative is only exercisable over individuals who have voluntarily chosen a seafaring life, and it does not extend to landsmen or fishermen except in certain cases (see Chitty, pp. 48-47).

Maitland says: "There can be no doubt at all that to press sailors into his service is one of the King's prerogatives. It has never been taken away. I cannot say when last it was used. It is not used in time of peace." Maitland suggests a doubt as to whether the King can use this prerogative in time of peace.

In 1743 Broadfoot was indicted for murdering Calahan, a sailor, on a man-of-war. Broadfoot was being impressed for naval service and he shot Calahan.

The judge directed a verdict of manslaughter and held that "pressing for sea service is legal provided the persons impressed are proper objects of the law and those employed in the service are armed with a proper warrant" (Thomas, p. 114).

As conductor of war the King can also adopt measures to prevent the egress or ingress of his enemies out of or into his Majesty's dominions. Thus, his Majesty may proclaim blockades; may, during war or threatened hostilities and on occasions of emergency, lay an embargo on all shipping, and thereby prevent anyone from leaving the kingdom. The King may, on the other hand, permit an enemy to come into the country by granting to him letters of safe conduct.

But passports granted by the Foreign Secretary are now more usually obtained (Chitty, p. 49). The King can prevent any alien from coming into the country, whether in time of war or peace (*Musgrove* v. *Chund*, [1891] A. C. 272). The King on an emergency can enter on his subjects' lands to make fortifications; he has also a prerogative right in saltpetre and gunpowder; he may also prohibit the exportation of arms or ammunition or

other articles of that nature useful in war, called contraband of war, out of the kingdom.

What is termed the war prerogative of the King is created by the perils and exigencies of war, is for the public safety, and by its perils and exigencies is limited (Chitty, p. 50).

Ambassadors.—The King possesses the right to receive and send ambassadors from and to foreign countries.

The Sovereign can probably refuse an ambassador who is objectionable to him personally or otherwise.

The right to receive ambassadors is more important than it at first sight appears, as no ambassador (*h*) or any member of his train or any member of his family is liable to civil process, and he is probably not liable to criminal process, though Oliver Cromwell is reported to have sanctioned the execution of an ambassador found guilty of murder. But modern practice is in favour of the complete exterritoriality of diplomatic agents (see Hall's International Law, 3rd ed., p. 168).

In Queen Anne's reign the ambassador of Peter the Great was arrested for debt. He gave bail in the action and communicated with the Russian Court, and Peter demanded the instant execution of all parties concerned. This modest request was not complied with, but an Act was passed which provided that all writs and process whereby the person of any ambassador or his domestics may be arrested or his goods distrained or seized shall be void, and the persons prosecuting and their solicitors, and those who execute such process, shall suffer such penalties and corporal punishment as the Lord Chancellor or the Chief Justice or any two of them shall think fit, but no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, is to be protected by the Act, nor shall anyone be punished for arresting an ambassador's servant unless the name of such servant be registered with the Secretary of State (Stephen, vol. 2, bk. 4, c. 6, and 7 Anne, c. 12).

As to the extent of this privilege some doubt exists, and it probably does not include detention for *mala in se* (Stephen, vol. 2, bk. 4, c. 6).

(*h*) Including in this term all superior diplomatic agents—*e.g.*, minister plenipotentiary, &c.

The Archbishop of Canterbury can grant Lambeth degrees, and does so now and then, to persons who are of eminent piety, but devoid of scholastic attainments.

Archbishop of York.—This functionary is the ecclesiastical superior of all the bishops in his province, who owe him canonical obedience. His duties are almost precisely similar to those of the Primate of all England. Both archbishops present to livings when the bishop of the diocese omits so to do. They are *ex officio* assessors of the Judicial Committee in ecclesiastical appeals.

Bishops.—A bishop has multitudinous duties. He ordains priests and deacons. He helps the archbishop to consecrate other bishops. He licenses curates. He licenses churches and other buildings for public worship. He consecrates churches and graveyards. He confirms persons as a preliminary to receiving the Holy Communion.

No curate can officiate for more than three consecutive weeks in a benefice without the bishop's leave.

The bishop institutes clerks to livings, and collates clerks in cases where he has the right of patronage. Under the Benefices Act, 1898 (c. 48), the bishop may refuse to institute a clerk nominated by the patron in many cases where he was powerless to do so before. He can now insist on a certain amount of pastoral experience, and refuse to institute where the candidate is physically or mentally unfit, of doubtful moral character, or in serious pecuniary embarrassment, or where there has been within twelve months a simoniacal transfer. As to appeal, see section 3. Irrespective of the Act, it is believed that he can refuse to institute where he has good reason for supposing that doctrinal offences will be committed (*Heywood* v. *Bishop of Manchester*, 12 Q. B. D. 404).

The bishops sit in rotation in the Judicial Committee of the Privy Council to hear Privy Council appeals relative to Church matters (see 39 & 40 Vict. c. 5, s. 14). They have to wait their turn before they can demand a writ of summons to the Lords, unless they become *ex officio* lords of Parliament on becoming

bishops, as is the case with the two archbishops and the Bishops of London, Durham, and Winchester.

Bishops can visit all the clergy in their dioceses, and insist on preaching in any diocesan church. With the bishops also rests the decision whether their clergy shall be proceeded against by the Church Courts. They have to examine candidates for orders, or rather to supervise such examinations (cf. Phillimore's Ecclesiastical Law, 2nd ed., p. 88).

They can in certain cases impose one or more curates on their clergy.

The making and consecrating and enthronement of bishops.—When a bishop dies or retires the Premier sees the King, and a choice is made of some fit person, who must, according to the Rubric, be over thirty years of age. A document, called a *congé d'élire*, is then sent to the dean and chapter bidding them elect a successor, and the dean and chapter then go through a fictitious form of election, as in point of fact they are bound to elect the person nominated in the letters missive, a document which accompanies the *congé d'élire*. After this fictitious election, the candidate for office assents to his appointment before a notary public. After election the new bishop must have the election of the dean and chapter confirmed in the court of an official called the vicar-general of the province. There, persons who object to the appointment have a right to publicly record such objections before the vicar-general, but as this official is only nominally a judge, they gain nothing for their trouble (*R.* v. *Archbishop of Canterbury*, [1902] 2 K. B. 520). In the newly created bishoprics where there is no dean and chapter, the Crown appoints direct by Letters Patent.

After confirmation the bishop is consecrated, installed in his cathedral, and afterwards, on another day, does homage to the king in respect of his episcopal lands. After all this, he has to wait his turn for a summons to the Lords, unless he is an *ex officio* lord of Parliament.

Deans.—Deans (*decani*) are appointed by Letters Patent, and with the exception of the four Welsh deaneries the patronage of the office belongs to the Premier.

The dean is the head of the chapter (consisting of canons or prebends), which is supposed to be the advisory council of the bishop, but which has no advisory functions. The dean is the superior of the other members of the chapter, and he presides at the election of the bishop. He is the parish clergyman, so to speak, of his own cathedral. He performs the ceremony of enthroning an archbishop and installing a bishop.

The canons and prebends.—These are members of the bishop's advisory council. They have few duties beyond assisting the dean in the cathedral services and signing episcopal leases and grants.

Like the dean, they must reside for a prescribed period in the cathedral city. They have certain duties as to preaching in the cathedral church, and sometimes elsewhere (Phillimore).

No person can be appointed a dean till he has been in priest's orders for six years (3 & 4 Vict. c. 113).

Archdeacon.—This official is a kind of ecclesiastical superior in his district, where, like the bishop, he is a visitor of the clergy. He has certain duties as to directing church and parsonage repairs. He is the nominal head of a court with jurisdiction both civil and criminal, presided over by a judge called the official principal, but this court is now obsolete (cf. Phillimore, 2nd ed., p. 199).

No person can be made an archdeacon till he has been in priest's orders for six years (3 & 4 Vict. c. 113).

The rural dean is an ecclesiastical superior in respect of his ruri-decanal district. He has certain functions incident to repair of Church property. He has certain duties under the old Church Discipline Act, which is now practically only operative as to cases of simony and non-residence; but where there is any clerical scandal in his district he should report to the bishop. He holds ruri-decanal meetings at which his clergy attend.

The parish clergy.—These consist of rectors, vicars, perpetual curates, and curates. A rector takes all the tithes of the benefice, both great and small, whilst the vicar is only entitled to the smaller tithes.

Incumbents of district churches in towns and other populous places may now by Act of Parliament style themselves vicars.

Privileges and liabilities of the clergyman.—A clerk in holy orders is privileged from civil arrest whilst proceeding to the solemnization of Divine service, whilst performing Divine service, and on his way home from such performance. He enjoys the like privilege whilst going to, during, and returning from Convocation (6 Hen. VI. c. 1). He is subject to the canon law, whether he holds any preferment or not, and he can be ordered to pay the costs of proceedings for immoral conduct, and in default of payment can probably be proceeded against under the writ *de contumace capiendo*. He can be tried for simony and non-residence by the bishop under the old Church Discipline Act; for doctrinal offences under the Public Worship Regulation Act, 1874; and for uncleanness and wickedness of life under the Clergy Discipline Act, 1893.

The bishop can veto the proceedings both under the Clergy Discipline Act and the Public Worship Regulation Act. No clergyman can be a member of the House of Commons or a borough councillor, but he may be a county or district or parish councillor. He cannot farm more than eighty acres of land without the bishop's leave, nor can he engage in any trade for profit where there are more than six partners, or unless he has inherited the business. He may be a company director, buy and sell literary productions, edit periodicals, &c., and may be a schoolmaster, professor, university lecturer, dean, tutor, bursar, &c.

A clerk may become a layman by availing himself of 33 & 34 Vict. c. 91. He must give six months' notice, and conform generally to the directions prescribed by the statute.

Again, the bishop has a power, which is very seldom exercised, of expelling a man from the Church. This can be done when the clerk has been found guilty of uncleanness and wickedness of life, and perhaps also in cases of simony and heresy. The ceremony takes place in the cathedral church, and a full account of what was done in Mr. Piggott's (or Smyth-Piggot) case will be found in *The Times* of March 8, 1909.

In this case the expelled clerk was absent. The bishop, after pronouncing sentence, offered up a prayer for his erring brother. It entirely rests with the bishop whether he will unfrock a man or not, and it makes no difference whether the clerk holds preferment or not.

Ecclesiastical courts.—The following are the principal Church courts :—

1. The Court of the Archdeacon, presided over by the official principal, appointed by the archdeacon himself (Phillimore, vol. 1, p. 200). This tribunal is now obsolete, but there is a supposed right of appeal from its decisions to the Court of the Bishop.

2. The Bishop's Consistory Court, presided over by the bishop's chancellor, who must be a barrister of at least seven years' standing. This court has a jurisdiction both civil and criminal, and this jurisdiction extends to clergy and also to laity. It can try clergy for uncleanness and wickedness of life, but not for doctrinal offences. Stephen tells us it can try laymen for fornication, incest, adultery, and other deadly sin, and Professor Maitland thinks it has still jurisdiction over laymen who are guilty of the crime of heresy. It can punish laymen or clergy for brawling (*i.e.*, gross misbehaviour within the precincts of a church or churchyard). It can punish laymen also by keeping them from entering a church, and by refusing them the Sacrament; and where a clergyman refuses the Sacrament to a parishioner the court has jurisdiction. It can mulct clergy, and probably laity, in costs, the payment of which can be enforced by the writ *de contumace capiendo*. The bishop can veto the prosecution of a clergyman for uncleanness and wickedness of life. When the trial is of a quasi-criminal character, the chancellor is assisted by five assessors, who act as judges of fact (Clergy Discipline Act, 1892).

The criminal jurisdiction over laymen is almost obsolete, save perhaps as to brawling. According to Mr. Eustace Smith, the chancellor can punish laymen by admonition (reprimand only by judge), penance (obsolete), expulsion from the Church (*ab ingressu ecclesiae*), and by excommunication. Excommunication is of two kinds, the less and the greater. The less excludes a

man from the services and sacraments, and the greater cuts him off, or is supposed to cut him off, from the fellowship of the faithful (Phillimore, vol. 2, p. 1087).

Formerly, the excommunicated man had not the privilege of serving on a jury, neither could he give evidence in court, or bring an action to recover property, but by 55 Geo. III. an imprisonment up to six months could be imposed for the greater excommunication, but the excommunicated man is to labour under no incapacity.

As regards civil jurisdiction, a great deal depends upon the patent to act as judge given by the bishop to his chancellor; but, speaking generally, the chancellor grants faculties for alterations in churches, has a supposed jurisdiction as to mortuary fees or corse presents, and deals with questions of repairs of Church fabric and property, and also with disputed rights to pews.

3. The Court of the Bishop sitting in person to try cases under the Church Discipline Act, *e.g.*, simony and non-residence. This court hardly ever sat, as the bishop had a habit of sending the case for trial before the Dean of Arches by Letters of Request.

4. Arches Court. The judge of this court is the Dean of Arches.

The court has cognizance of ecclesiastical appeals from the Consistory Courts of the Bishops in the province of Canterbury, and has taken over the functions of the old Provincial Court of the Archbishop of Canterbury. The Dean of Arches has jurisdiction *quâ* Dean of Peculiars over the thirteen peculiar parishes in the diocese of London which formerly were within the peculiar jurisdiction of the Archbishop of Canterbury. The dean is also the judge under the Public Worship Regulation Act, 1874, for the trial of doctrinal offences and practices. He is also usually Master of the Faculties to the Archbishop of Canterbury (37 & 38 Vict. c. 85, s. 7).

5. The Provincial Court of the Archbishop of Canterbury still exists in theory, but in practice the Dean of Arches hears all Consistory Court appeals.

6. The Provincial Court of the Province of York. This court takes cognizance of appeals from the Consistory Courts in the

diocese, and, as regards York, is a Consistory Court of first instance. The judge is the Dean of Arches.

7. The Court of the Archbishop, presided over by himself or his vicar-general, which can try bishops for ecclesiastical offences and also persons accused of heresy in the province.

8. The Judicial Committee of the Privy Council, which is the supreme court of appeal in all matters ecclesiastical.

to His Majesty King George V. . . . by virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations" (Art. 4). The Free State was to assume her fair share of the public debt and of war pensions subject to any just counterclaim available to her : the determination of the sums due to be settled, failing agreement, by arbitration (Art. 5).

The defence by sea of Great Britain and Ireland was to be controlled by the Imperial Parliament pending the conclusion of arrangements by the Free State for her own coastal defence (Art. 6). By Art. 7 the Free State is to afford the Imperial forces in time of peace certain specified harbour and other facilities, and in time of war any facilities those forces may require. Any military defence force established by the Free State is to bear the same proportion to those of Great Britain as the population of the Free State bears to that of Great Britain (Art. 8).

The ports of the Free State and Great Britain are to be open to the ships of the other country on payment of the ordinary dues (Art. 9). Articles 11 and 12 provide that until one month after the statutory ratification of the Treaty the Treaty is to have no application to Northern Ireland, which is to continue subject to the 1920 Act.

Before the expiration of that month the Parliament of Northern Ireland may do one of two things : It may by resolution of both Houses decide to return members to the Free State Parliament; it may by similar resolution vote itself out of the Treaty arrangements and continue under the 1920 Act. If it resolve in favour of continued exclusion (*b*) from the Treaty, the resolution is to receive effect, subject to the readjustment of the frontiers of Northern Ireland and the rest of Ireland by a special commission, "in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographical considerations."

If the Parliament of Northern Ireland does not resolve in favour of continued exclusion, it continues to exercise the powers conferred upon it by the 1920 Act. But in that event the Free

(*b*) This is what it has done.

State Government and Parliament may exercise in Northern Ireland, in relation to matters outside the competence of the Parliament of Northern Ireland, the same powers as it can exercise in the rest of Ireland (Art. 14). The exercise of these powers is to be subject to safeguards to be agreed between the Government of Northern Ireland and the provisional Government of Southern Ireland (Art. 15) (*c*).

IRISH FREE STATE CONSTITUTION ACT (13 Geo. V. c. 1).

This Act enacts as law a Constitution, drafted by the Dail Eireann sitting as a constituent assembly. The Constitution purports to embody the principles underlying the Treaty, is directed by its powers to be construed with reference to the Treaty, and is declared to be void to the extent of its repugnancy therewith. The draft Constitution and the Treaty are scheduled to the Act (Scheds. I. and II. respectively).

After declaring that all powers of Government are derived from the people (Art. 2), and stating who shall be citizens of the Free State (Art. 3), the Constitution formally secures the liberty of the person and provides that no person is to be deprived thereof except in accordance with law. Nothing in these Articles, however, is to control any act of the military forces in time of war or rebellion. It proceeds to declare inviolable the dwelling of each citizen (Art. 7), freedom of conscience and free profession and practice of religion, subject to public order and morality (Art. 8), freedom of expression of opinion, of assembly, and of association (Art. 9), and the right of every citizen to free elementary education (Art. 10).

The Legislature.—Articles 12 to 50 inclusive deal with the Legislature, or "Oireachtas." It is to consist of the King and two Houses—the Chamber of Deputies (Dail Eireann) and the Senate (Seanad Eireann). The *Dail* is to be elected, and the "referendum" and "initiative" (*d*) may be exercised by all

(*c*) The nature of this provisional Government is explained in Art. 17. In the interval between the Treaty date and the Constitution of the Parliament and Government of the Free State, the existing irregular Parliament of Southern Ireland is to be constituted a provisional Government and is to be endowed with the powers requisite for the discharge of its duties.

(*d*) See *infra*.

adult citizens of either sex; and the Seanad is to be elected by all citizens of either sex who have reached thirty—subject in each case to the existing electoral law (Art. 14). The oath to be taken by members of the Oireachtas is that provided for in the Treaty (Art. 17). Members are to enjoy the same privileges from arrest, and the same privilege of free speech within the Oireachtas as obtains in the Imperial Parliament (Art. 18), and official reports of proceedings in the Oireachtas are to be privileged (Art. 19). Each House may make, and if necessary enforce by penalties, its Standing Orders, and elect its own officers (Arts. 20 and 21). Members of the Oireachtas are to be paid, and to travel free (Art. 23). The Oireachtas is to hold at least one session a year (Art. 24) and is to sit publicly except in cases of special emergency (Art. 25). Article 26 fixes the minimum and maximum numbers of constituents for representation by one member, and provides that elections shall be upon the principles of proportional representation. At a general election the polls are to be on the same day.

The Seanad is to be composed of citizens over thirty-five years of age who have performed useful public service or possess special qualifications. It is to consist of sixty members elected for twelve years (Arts. 30 and 31), one-quarter being elected every three years on principles of proportional representation (Art. 32). They are to be elected from a panel consisting as to two-thirds of nominees of the Dail and as to one-third of nominees of the Seanad itself (the nomination proceeding in both cases by voting on principles of proportional representation) (Art. 33). Article 35 confers on the Dail exclusive competence with reference to money bills, certified to be such by its chairman. As regards other bills the Seanad may propose and the Dail may consider amendments: but a bill passed by the Dail and considered by the Seanad shall, 270 days after it has been sent up to the latter, be deemed to have been passed by both Houses in its original form, unless this period is extended by agreement (Art. 38).

Royal assent.—The royal assent to a bill passed by both Houses may be given, withheld or reserved by the representative of the Crown on the same principles as those observed in the Dominion of Canada (Art. 41).

The Referendum.—Any bill passed by both Houses other than a money bill or a measure of urgent necessity may, on the written demand of two-fifths of the Dail or a majority of the Senate, be suspended for ninety days, and within that period may be submitted to a referendum (Art. 47).

The Initiative.—The Oireachtas may provide for the initiation of proposals for laws or constitutional amendments by the people. If it fails so to do within two years, and a certain number of citizens petition to that effect, it must either make such provision or refer to a referendum the question whether such provision shall be made (Art. 48).

The Oireachtas may amend the Constitution within the limits prescribed by the Treaty: but after eight years from the Constitution receiving effect the following conditions must be satisfied before an amendment can become law:—

(1) there must be a referendum;
(2) a majority of the registered electors must poll their votes;
(3) either a majority of the registered electors, or two-thirds of those who poll, must support the amendment (Art. 50).

The Executive Authority (which is to be exercised as in Canada) is vested in the King, with the assistance of an Executive Council.

This Council is appointed as to not less than five of its members by the representative of the Crown on the nomination of the President of the Council. These, like other members of the Council, must be members of the Dail (Arts. 51 and 52). The Dail nominates the President of the Council, and he nominates a Vice-President. The President appoints those members of the Executive Council who are not appointed by the representative of the Crown. The Ministry is collectively responsible to the Dail and must resign if its support is withdrawn (Arts. 53 and 54). Ministers other than those on the Executive Council are appointed by the representative of the Crown on the nomination of the Dail (Art. 55); they are responsible to the Dail alone for the administration of their departments (Art. 56). All Ministers can attend and be heard in the Seanad (Art. 57). The represen-

tative of the Crown is to be styled "Governor-General," and is to be appointed as in the case of Canada (Art. 60).

The Judicature.—The Constitution provides for the establishment by the Oireachtas, in addition to courts of local and limited jurisdiction, of—

(a) a High Court—a court of first instance for all questions of law and fact, civil and criminal, including the validity of laws having regard to the Constitution;

(b) the "Supreme Court" of the Free State, with appellate jurisdiction from all decisions of the High Court, including decisions on the validity of laws.

The decisions of the latter are final, subject only to an appeal by special leave to the Judicial Committee of the Privy Council (Arts. 64 to 66).

Judges are appointed by the Governor-General on the advice of the Executive Council, and are only removable by resolution of both Houses. A judge may not sit in the Oireachtas (Arts. 67 to 69).

Article 70 may be set out in full :—

> "*Article* 70.—No one shall be tried save in due course of law and extraordinary courts shall not be established, save only such military tribunals as may be authorised by law for dealing with military offenders against military law. The jurisdiction of military tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction."

By Article 72 persons charged with criminal offences (other than summary offences) must be tried by jury.

The rest of the Act deals with requirements to be fulfilled before the Constitution can be given full effect, and is of no permanent importance.

By section 8 of the Constitution Act the Free State may adopt any Imperial Act applicable to the self-governing Dominions, while section 4 saves the right of the Imperial Parliament to make laws affecting the Free State in any case where it would, in accordance with constitutional practice, make laws affecting the other Dominions.

By the Irish Free State (Consequential Provisions) Act, 1922 (c. 4), passed simultaneously with the Constitution Act, the 1920 Act is for the most part repealed except in its application to Northern Ireland, and certain other consequential changes are enacted.

The Irish Free State Constitution as a whole has therefore to be deduced from four different instruments: (1) the "draft" Constitution, Schedule I. of the "Constitution Act"; (2) the Articles of the Treaty (Schedule II. of the Constitution Act, and the Treaty Act), which override the draft Constitution where they conflict with it; (3) the main body of the Constitution Act, other than the Schedules; (4) the Consequential Provisions Act: while if Ireland as a whole is regarded, the Constitution has still to be reconciled with such parts of the Government of Ireland Act as remain standing.

The Constitution is in many respects peculiar, if not unique, among colonial Constitutions: (1) It declares a number of abstract rights and liberties after the manner of continental Constitutions (including the right of free elementary education). (2) Neither in the Treaty nor in the scheduled Constitution are the powers of the Free State Parliament specifically defined either by exclusion or enumeration. There are, indeed, casual negative indications of its powers, *e.g.*, it may not endow a religion or maintain defence forces exceeding a certain scale (Treaty, Arts. 8 and 16). On the positive side all we are told is (i) that the Parliament may make laws for the peace, order and good Government of Ireland, and (ii) that the relations between the Free State and Imperial Parliament shall, as a matter of law, practice and constitutional usage, be those which obtain between Canada and the Imperial Parliament. Presumably, then, the Free State is intended to have the same legislative powers as the Dominion Parliament plus the provincial legislations of Canada. (3) While

matters of such importance are but vaguely adumbrated, relatively trivial matters such as free travelling passes for Members of Parliament are specifically provided for. (4) The most up-to-date innovations of constitution-builders are woven into this Constitution, *e.g.*, a Senate elected mainly by the Lower Chamber. It might be to provide safeguards for the supremacy of the Lower House in the event of conflict with the Senate, proportional representation, adult suffrage (male and female), the referendum, and the initiative. (5) The oath of allegiance to be taken by members of the Free State Legislature is, we think, unique in form.

II.

NOTE ON THE SYSTEM OF GOVERNMENT IN INDIA.

It is convenient, in giving a short account of the system of government in India, to consider (1) that system as it existed before the Government of India Act, 1919 (c. 101), and (2) the comprehensive reforms introduced by that statute.

(1) The System as it existed before the Act of 1919.

(1) The system on which the 1919 Act engrafted its reforms is embodied in the Government of India Acts of 1915 (c. 61) and 1916 (c. 37), which consolidated the provisions of the long series of statutes enacted by Parliament from time to time to regulate directly and indirectly the administration of British India, first by the East India Company and later by the Crown.

Under this system the Secretary of State in Council, responsible to the Imperial Parliament, had unlimited power to "superintend, direct and control all acts, operations and concerns which relate to the government and revenues of India." The Government of India had, subject to any directions received from the Secretary of State in Council, superintendence and control over all affairs, civil and military, in India. There were fifteen Provinces in India, each with a local Government. The three

"Presidencies" of Madras, Bombay and Bengal were administered by a Governor and an Executive Council of three members, one Province (Bihar and Orissa) by a Lieutenant-Governor, also with an Executive Council of three members, two Provinces (the United Provinces and the Punjab) by a Lieutenant-Governor without an Executive Council, and six minor Provinces by Chief Commissioners, who were technically agents of the Government of India, though in course of time their status and powers had come to differ little from those of Lieutenant-Governors. As a matter of law the authority of the Government of India in relation to the local Governments was an overriding authority, both legislative and executive, extending to all provincial matters as well as to those affecting India as a whole, the provincial Governments possessing no legal autonomy whatever. Any demarcation, therefore, of separate spheres, legislative or administrative, between the Central Government on the one hand and the Provincial Governments on the other was based, not on a legal distribution of powers, but on practice and convention.

(a) This absence of formal demarcation is the first point to note when considering the effect of the reforms of 1919.

(b) The second point to note concerns finance. Prior to those reforms the "revenues of India" were a single undivided corpus. The Secretary of State was responsible to the Imperial Parliament, and the Government of India was responsible to the Secretary of State, for the expenditure of every rupee of public money in India. Provincial Governments could impose no taxes on their own initiative and had no independent revenues on the security of which to raise loans. In practice a certain proportion of the "revenues of India" were allocated by the Central Government each year to the several Provinces to meet provincial services.

(c) The third point to note is that prior to the 1919 reforms, although there was a Legislative Council associated with the Central Government of India and with each of the nine "major" Provincial Governments, neither in the Government of India nor in the Provincial Governments was the Executive in any degree responsible to its legislative body. Nor were those bodies pre-

dominantly—though it will be seen from what follows that they were to some extent—elective. Originally the legislative authority in India consisted in the Governor-General or the Governor (for at one time only the two Presidencies of Madras and Bombay had legislative powers separate from those of the Governor-General in Council) and their respective Executive Councils, meeting "for purposes of legislation." The Executive Councils have always consisted, as they still consist, of officials nominated by the Crown. To such meetings the Governor-General (or, as the case might be, the Governor) summoned a limited number of "additional members," who were in part officials and in part non-officials, but were all nominated by the Governor-General or Governor, as the case might be. Such a meeting could only consider the particular legislative measure or measures with reference to which it was convened. Gradually the "additional members" increased in numbers, and came to be elected instead of nominated by the head of the Provinces. From time to time, also, local legislatures were created in seven other Provinces besides the two Presidencies of Madras and Bombay. Both the Constitution and powers of these legislative bodies were considerably extended by Lord Morley's Indian Councils Act, 1909 (c. 4), and the rules framed under it.

(i) As to their constitution, the principle of election was recognised as the means of selecting non-official members of all legislative Councils; the numbers both of official and of non-official members were increased, and a non-official (though not an elected) majority provided for in every Province. (ii) As to their powers, it was provided that the local Government might make rules authorising the discussion of the annual financial statement and of any matter of general public interest, and permitting the asking of questions. Such rules recognised the right of the Councils to vote on motions submitted for their discussion.

The Morley Act also resulted in the appointment of an Indian member to the Executive Council of the Viceroy and to all provincial Executive Councils then existent or subsequently created, though there had been no legal bar to such a course previously.

Thus, before the Act of 1919, the provincial Councils, though they had in theory wide power "to make laws for the peace and

good government of the territories for the time being constituting the Province," were greatly limited in their initiative partly by a close control maintained over their legislative proposals both by the Government of India and by the Secretary of State : while in the sphere of finance and of general administrative policy they had no control over the Executive, which was responsible solely to the Crown.

(2) Changes wrought by the Act of 1919.

A. *In the Provinces.*

(a) First, the Act effected a statutory demarcation of the functions to be exercised, in the sphere of administration, between the Central and Provincial Governments and Legislatures. In the legislative sphere no rigid legal demarcation was enacted, the Central Legislature retaining a concurrent power of legislation in provincial matters, though, subject in certain cases to previous sanction, a Provincial Legislature may amend or repeal central legislation in its application to that Province. But rules made under the Act specify certain provincial matters only as a proper field for the legislative intervention of the Central Legislature, and assume that a convention will obtain whereby the restriction so laid down will be strictly observed.

(b) *Finance.*—The sources of the " revenues of India " are by the Act definitely distributed between the Central and Provincial Governments. Within the limits assigned to them, also, the latter can now raise taxes for provincial purposes, and can raise loans on the security of their provincial revenues. Even within those limits, however, the Central Government, with its heavy commitments in respect of defence and other " all-India " services, cannot afford to concede to the Provincial Governments a completely free hand, and it retains, accordingly, under the Act some degree of control over the fiscal policy and borrowing operations of the Provinces.

This control is the more necessary as no allocation of sources of revenue could be devised which did not leave the central Government with a deficit. Hence, in addition to the control referred to above, an annual contribution from the Provinces to the Central Government is provided for. This sum is not to be

increased, and it is desired that it should cease to be paid as early as practicable.

(c) A substantial instalment of responsible and representative government was at the same time conferred upon the Legislative Councils of the nine major Provinces (including Burma, to which the provisions of the Act were extended in 1922).

(i) The Councils were much enlarged and an elective majority of at least 70 per cent. of the total membership was provided for in each of them.

(ii) The franchise was granted to between six and seven million Indian and Burman subjects. Space does not permit an exposition of the basis of the franchise.

(iii) An Executive Council was set up in each of the nine "major" Provinces on the model of those previously in existence in the three Presidencies and in Bihar and Orissa.

(iv) The "provincial subjects," which, as already mentioned, were assigned to the jurisdiction of the Provincial Governments and Legislatures, were subdivided into two categories—"reserved" and "transferred." The administration of "reserved subjects" was made the charge of the Governor and his Executive Council. "Transferred subjects" were handed over to the Governor acting with Ministers, who are selected by him from the elected members of the Legislative Council and are responsible to that body. The Provincial Executive is now a dual organism: *quoad* "reserved" subjects, it consists of the Governor in (Executive) Council; *quoad* "transferred" subjects, it consists of the Governor acting with Ministers: the Governor thus forms the link of unity between the two parts. For the administration of reserved subjects the Governor in Council remains responsible in the last resort to the Secretary of State and the Imperial Parliament; for the administration of transferred subjects the Ministers are responsible to the Legislative Council of which they are members, though the Governor is not bound to act on their advice.

The Legislative Council has jurisdiction equally over all provincial subjects, both transferred and reserved. But in respect of the latter category it was necessary to provide the irremovable Executive (the Governor in Council) with power to counteract

in emergencies an adverse vote of the Legislature in which officials form a small minority, and to arm him with power to secure, in spite of such a vote, the legislation which he regards as essential for the discharge of his responsibilities.

This power is provided by section 72 (e) of the Act, which enables the Governor to certify a bill which relates to a reserved subject as being essential to the discharge of his responsibilities for the subject to which it relates, and thereupon to enact it on his own responsibility.

As regards legislation affecting "transferred subjects" a majority vote of the Council is conclusive. But since no Provincial Act has validity unless it is assented to by the Governor and the Governor-General, it is open to either of those authorities to disallow any Act after it has been passed. And similar power vests in the King in Council in respect of any Act which has been assented to by the Governor and the Governor-General.

Perhaps the most important extension of the powers of the Legislative Councils effected by the Act is in the sphere of finance. The estimates of the provincial expenditure and revenue for the year must (by section 72 (d)) be laid before the Council, together with the proposals of the local Government for the appropriation of the revenues in the form of demands for grant, with the exception of appropriation for certain specified services such as the provincial contribution to the central Exchequer, interest on loans and the pay of officials appointed by the Crown or the Secretary of State in Council, which are not subject to the Council's vote. With these exceptions, however, all expenditure proposed by the Government, whether for reserved or transferred services, requires the provision of supply by vote of the Council on the appropriate "Demand," and on presentation of a Demand the Council may assent, reject it, or reduce it in amount. Here also, however, it was necessary to provide the Governor in Council with power similar to that already described with respect to legislation to enable him to obtain the supply which he regards as essential for the discharge of his responsibilities for reserved subjects, notwithstanding an adverse vote: consequently the local Government has "power in relation to any demand, to act as if it had been assented to notwithstanding the withholding of such assent

or the reduction of the amount therein referred to if the demand relates to a reserved subject, and the Governor certifies that the expenditure provided for by the demand is essential to the discharge of his responsibility for the subject."

The transfer of control over certain subjects to Ministers responsible to the Provincial Legislative Council made it necessary to enable the Secretary of State and the Government of India to divest themselves, in respect of those subjects, of the unlimited powers of "superintendence, direction and control" which have already been noticed as the central feature of the old regime. Accordingly the Act gave a rule-making power with this object, and the rules framed have in fact limited the power of intervention in "transferred" administration to certain specified purposes, such as the safeguarding of Imperial interests and the administration of "central" subjects, and the settlement of inter-provincial differences. Over "reserved" provincial subjects and "central" subjects no change in law has been made in the supremacy of His Majesty's Government as represented by the Secretary of State, though the policy of the Act of 1919 necessarily assumes considerable increase in the *influence* over even those matters to be exercised by the Provincial and Indian Legislatures respectively.

B. *In the Central Government of India.*

The foregoing changes relate either to the relations between the central and local Governments or to the constitution and powers of the local Governments. The central Government is left by the Act unchanged save that (a) the Governor-General's Executive Council may now consist of more than six members (it consists at the present moment of seven, of whom three are Indians), and (b) the central Legislature, now called the "Indian Legislature," is reconstituted on enlarged and more representative lines: it now consists of the "Council of State" (the Upper Chamber), consisting of sixty members, of whom thirty-four are elected, and the "Legislative Assembly" (the Lower Chamber), consisting of 144 members, of whom 104 are elected. Officials have twenty-six seats in the Assembly: in the Council of State they cannot exceed twenty.

The powers and duties of the "Indian Legislature" differ little in character within the "central" sphere from those of the Provincial Councils in the provincial sphere. But as in the Indian Legislature there is no responsible Government, the Governor-General's power to disregard an adverse vote in either Chamber is not limited, like those of provincial Governors, to certain specified subjects, but covers the whole field. The sphere of operations of both Chambers of the Indian Legislature is identical, except that the power to vote supply is confined to the Legislative Assembly. In respect of money bills the Chambers have equal powers.

It will be evident from the foregoing account—brief and incomplete as it necessarily is in many respects—that the present Indian Constitution contains many features which, judged by commonly accepted standards, are anomalous and unprecedented. This was fully recognised by its authors, who were, however, faced with the unprecedented task of devising a system which would provide at once an *instalment* of responsible government while maintaining some measure of the direct responsibility of the Imperial Parliament for the administration of Indian affairs which had been in theory complete and absolute since 1858 : and at the same time of fashioning the nature of the instalment in such a way as to enable it to be expanded by stages without structural alteration until a complete transfer of control from the British Parliament and electorate to Indian Councils responsible to an Indian electorate had been effected. To what extent the expedients adopted with this object will work "according to plan" time and practical experience alone can demonstrate.

III.

UNITED STATES CONSTITUTION.

As this Constitution forms part of the student's curriculum, and as it is the parent of all federal constitutions, except, perhaps, the Swiss, a brief account of it is given here. The Constitution was issued in September, 1787, but it has been amended from time to time.

Its salient feature is the attempt, largely successful, to separate sharply the Legislature, the Judicature, and the Executive.

The Legislature is vested in Congress, consisting of two Houses, viz., the Senate and House of Representatives. Judicature is vested in the judicial bench, and the Executive in the President, who has to be guided in certain instances by the Senate.

The President holds office for four years, and is elected in the following manner: Each State of the Union elects a "college" of electors equal to the number of senators and representatives to which such State is entitled, and the man who gets the largest numbers of the votes of these electors is chosen President. (For further particulars see Dodd's Modern Constitutions, vol. 2, p. 301.) The person chosen must be at least thirty-five years of age and fourteen years resident in the United States. If the President dies during his term of office the Vice-President takes his place for the remainder of the term. The President is commander-in-chief of the army, navy, and militia. He can pardon crimes, impeachments excepted.

The President also can be impeached like other American statesmen, but impeachment can only involve loss of office. By and with the advice of the Senate the President can conclude treaties with foreign Powers, provided that two-thirds of the Senate concur, and the same assent is necessary for declaring war and making peace. As the Senate holds office for a longer period than the House of Representatives, the President occasionally has a hostile Upper House to deal with.

The Senate also has to be consulted about the nomination of public ministers, ambassadors, consuls, and the Supreme Court judges. The President can occasionally and temporarily fill up vacancies in the Senate. He may, on an occasion of great emergency, convene the Legislature and adjourn both Houses when they disagree.

He has, however, no voice in legislation, though he makes a speech at the beginning of the sitting, which may or may not receive attention.

He differs from the English Premier, or Cabinet, in that he

does not introduce a legislative programme which he is bound to carry out.

He recommends legislation in his inaugural speech, but has to enlist friends in the Legislature if he wishes to get a measure carried.

Congress must assemble once yearly at least. The Upper House, or Senate, consists of two members of each State, chosen by popular vote for six years, one-third retiring every two years. All senators must be over thirty years of age, citizens of the United States of at least nine years' standing, and residents in the States for which they are chosen. The Vice-President is *ex officio* President of the Senate. Each State, whether small or large, elects two senators. The members of the House of Representatives are distributed among the States in proportion to population, so that the more populous States outweigh the others. The House of Representatives was intended to represent the nation on the basis of population, whilst the Senate was to represent the States. The judicial bench can interpret the Constitution, and refuse to give effect to laws which contravene it. Again, the electoral college, who choose the President, vote to a man with their party and vote for the party candidate: to do otherwise being considered dishonourable (Dicey). Furthermore, the Senate lately ventilated the view "that the President could not exactly be a party man where the rights of the Senate were concerned."

Differences between the English and American Constitutions.

1. In America the President is in practice more of a ruler than the English King, but his legal powers are far more restricted.

2. The President can veto legislation, but by the adoption of somewhat complicated constitutional machinery such veto may be overcome; whilst the English King has, conventionally speaking, a very shadowy power of veto which has been dormant since the reign of Anne.

3. The English Constitution is flexible, the American rigid—*i.e.*, in England all laws, constitutional or otherwise, can be altered with equal ease, whilst in America complicated machinery is necessary for the alteration of the Constitution.

4. The judges, as in all written Constitutions, can disregard an Act of the Legislature which is *ultra vires*.

5. The American Constitution is written, whilst the English Constitution is unwritten.

6. In the American Constitution Montesquieu's doctrine of the separation of powers is followed as closely as possible, whilst in England it is not.

7. Parliament in England is the legal sovereign, whilst in America, as in most federal States, sovereign powers are split up amongst a number of co-ordinate bodies.

8. In England the impeachment of Ministers is obsolete, whilst in America it is part of the written Constitution.

9. The English Crown is inherited under a statutory entail, whilst the American President is elected for a term.

10. In England the treaty-making power is legally vested in the Crown (*i.e.*, the Cabinet by convention), whilst in America it is vested in the President and the Senate.

11. Declaration of war and the making of peace rests with the Crown in England, whilst in America it is vested in the President and Senate.

12. The American President is not dependent on the vote of Congress, whilst in England the Cabinet is. In America, therefore, the Executive is not responsible to the Legislature.

England is the only country possessing hereditary legislators. Even Germany and Austria do not possess these, though Germany possessed many hereditary Sovereigns.

APPENDIX B.

THE TREATY-MAKING POWER OF THE CROWN.

Blackstone says: "It is the Sovereign's prerogative to make treaties, leagues and alliances with foreign States. It is essential to the goodness of a league that it should be made by the sovereign power, and this power is vested in the King. Whatever contracts he engages in, no other power in the kingdom can annul." Maitland contends that a treaty made by the Crown, though binding upon the Crown in public international law, has no legal effect upon the rights of the subject (Constitutional History, p. 424), and instances the Extradition Acts to show that the King is precluded from surrendering persons accused of crime contrary to our law without the aid of a statute. No treaty, except under very exceptional circumstances, should collide with the rights of the subject.

In the case of *The Parlement Belge* (1879), 4 P. D. 429, Sir R. Phillimore quotes Blackstone's *dictum*, and then says, "Blackstone must have known very well that there were a class of treaties the provisions of which were inoperative without the confirmation of the Legislature," and then says that a treaty affecting private rights requires the sanction of the Legislature (cf. Maitland, pp. 424-425). The Court of Appeal reversed his judgment upon a question of fact, and decided that question of fact in such a way as to make it unnecessary for them to pronounce upon the legal principle underlying Sir Robert Phillimore's judgment. They did not, however, question that principle.

By the making of a treaty the Crown may bind the Legislature by a moral obligation to carry it into effect. "Treaties of peace when made by the competent power are binding on the whole nation. If a treaty requires money to carry it into effect, and the money cannot be raised but by an Act of the Legislature, the

treaty is morally obligatory on the Legislature to pass the law, and to refuse it would be a breach of public faith" (Kent's Commentaries, 1873 ed., p. 166). See also *California Fig Syrup Co.* (1884), 40 C. D. 620, at p. 627.

In *Walker* v. *Baird*, [1892] A. C. 491, Lord Herschell said: "The learned Attorney-General . . . . conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary to compel obedience to a treaty." The Attorney-General had argued that the Crown can compel its subjects to obey the provisions of a treaty putting an end to a war and that its power could be no less in the case of a treaty the object of which was to avert war. Lord Herschell decided the case on the footing that it had not been pleaded that the treaty in question was of this character, and declined to decide whether a treaty either of peace or for the avoidance of war differed from other treaties in being enforceable in the municipal courts without being enacted.

APPENDIX C.

CESSION OF TERRITORY.

Professor Maitland is of opinion that the King may cede territory, at all events, territory acquired during war, but he is uncertain as to the extent of the power. He also considers that the King cannot without a statute cede land subject to the British Parliament (Maitland, p. 424). He says that parliamentary sanction was obtained to the treaty of peace after the War of Independence. Florida was ceded to Spain without a statute, but by a treaty of peace. Lord Thurlow argued, in opposition to Lord Loughborough, that such cession was lawful. Similar cessions were those of Senegal, Minorca, and Banca.

In the following cases the Crown alienated British territory by a treaty which was neither a treaty of peace nor a treaty to avert war :—(1) Case of the surrender in 1817 to the Sikhim Puttee Rajah of territory formerly belonging to Nepaul. (2) In 1833 a surrender to Voorunder Singh of a portion of Assam, the Rajah undertaking to abstain from torturing his subjects. The Rajah was also under the treaty to pay a large annual tribute (Forsyth, Cases and Opinions on Constitutional Law, p. 185). Mr. Forsyth also says that since the Mutiny there have been several of these cessions to Indian rulers, but remarks that Indian necessities cannot be judged by European precedents (*ibid.*, p. 186).

In 1853 the Orange River territory was abandoned by Order in Council and proclamation; and in 1863 the Crown relinquished without Act of Parliament its protectorate over the Ionian Islands—a different thing, as Palmerston contended, from ceding territory of which the Crown was sovereign. In 1890 the treaty ceding Heligoland was expressly made inoperative until confirmation by Parliament.

APPENDIX D.

THE EMERGENCY POWERS ACT, 1920 (c. 55).

This statute provides that, if at any time it appears to his Majesty that action has been taken, or is threatened, to interfere on an extensive scale with the supply of food, fuel, light, or other necessaries of life or with the means of locomotion, whereby the public or a large section thereof would be seriously affected, his Majesty may, by proclamation, declare a state of emergency. No such proclamation shall be in force for more than a month, without prejudice to the issue of a fresh proclamation during that period. Where proclamation of emergency has been made Parliament is to be informed thereof forthwith, and if the Houses be then adjourned or prorogued, they shall be summoned to meet within five days.

Where proclamation of emergency has been made, and so long as it shall be in force, his Majesty may in Council by order make regulations for securing the essentials of life to the community, and those regulations may impose on a Secretary of State or other Government Department, or any other person in his Majesty's service or acting on his Majesty's behalf, such powers and duties as his Majesty may deem necessary for preserving the peace, securing to the public the necessaries of life, the means of locomotion, and the general safety. Nothing in the Act is to authorise the making of regulations imposing any form of compulsory military service, the alteration of the rules of criminal procedure, or punishment for the peaceable persuasion of persons to join in a strike.

All regulations made by his Majesty shall be laid before Parliament as soon as practicable, and shall not continue in force after the expiration of seven days from the time they were laid before Parliament, unless a resolution is passed by both Houses providing for the continuance thereof. The regulations may

provide for the trial by courts of summary jurisdiction of persons offending against the same, and the maximum penalty for breach of the regulations shall be imprisonment with or without hard labour for three months, or a fine of £100, or both such imprisonment and fine together with the forfeiture of any goods or money in respect of which the offence has been committed.

The regulations so made may be added to, altered, or revoked by resolution of both Houses, but the expiry or revocation of such regulations is not to affect any action taken thereunder.

This Act, as well as the Church of England Assembly (Powers) Act, sanctions important legislation by resolution of both Houses. As regards the Church Act, the legislation only affects a section of the community, but as regards the Emergency Powers Act, criminal offences can be created in the first instance by a royal proclamation, and afterwards made permanent by resolutions in both Houses.

The Act is, perhaps, justified by necessity, but the precedent of altering the criminal law in any other way than legislation by bill, with its usual publicity, is hardly to be commended.

APPENDIX E.

CHARTERS AND OTHER CONSTITUTIONAL DOCUMENTS.

MAGNA CHARTA.

1. The Church is to be free and to have her liberties inviolable.

2. The heir, if of full age, is to pay the customary relief only—*i.e.*, for baron or earl, £100; for knight, 100s.

3. The heir of Earl or Baron, if under age, to be in wardship. When he comes of age to have his inheritance without relief and fine.

4. Guardians (*i.e.*, lords of fees) are to take reasonable and customary profits from the ward, and the inheritance is not to be wasted, neither is there to be destruction of property.

5. Heirs are to be married without disparagement (*i.e.*, they must marry a man or woman of similar rank).

6. The Sovereign shall not authorise mesne lords to exact other than the three customary aids: (1) to ransom the lord's person; (2) to contribute to knighting his eldest son; (3) to portion once his eldest daughter. Aids must be reasonable.

7. The King shall not hold the lands of convicted felons for more than a year and a day, after which the said lands are to be handed over to the mesne lord.

8. Common Pleas shall not follow the King's Court but shall be held in some fixed place.

9. The Assizes of Novel Disseisin, Mort d'Ancestor, and Darrein Presentment shall only be held in the court of the county where the lands are situate. The King, or in his absence the Justiciar (*a*), shall send into each county two justices four times each year, who, with four knights to be chosen by the county court, shall hold such assizes. . . .

(*a*) When the King is absent for any length of time from the country it is now the custom to appoint dignitaries styled Lords Justices to do certain formal acts on his behalf

10. A freeman shall only be amerced, for a small offence after the manner of the offence, for a great crime according to the heinousness of it, saving to him his contenement (*b*).

11. No sheriff, constable, coroner, or bailiff is to hold Pleas of the Crown (*c*).

12. The Writ of Inquest of life and limb shall be given gratis and not denied (*d*).

13. In future anyone may leave the kingdom and return at will, unless in time of war, when he may be restrained for some short space for the common good of the kingdom. Prisoners, outlaws, and alien enemies are excepted from the benefit of this clause.

14. Justices, constables, sheriffs, and bailiffs shall only be chosen from those who know the law and mean duly to observe it.

15. No scutage or aid shall be imposed, except the three accustomed aids before mentioned. . . .

16. In order to take the common counsel of the realm in the imposition of aids other than the accustomed aids, the King shall cause to be summoned the archbishops, bishops, earls, and greater barons by separate writs addressed to each, and all others by a general writ addressed to the sheriff of each county. A certain day and place is to be fixed for the meeting, of which forty days' notice shall be given, and the cause of summoning the assembly is to be specified and the consent of those present is to bind those not present.

17. "No freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers or the law of the land (*e*). To none will we sell, to none will we deny, or delay right or justice."

(*b*) This bears a distant resemblance to the *beneficium competentiae* familiar to students of Roman law.

(*c*) As to the meaning of the term "Pleas of Crown" see Langmead, 7th ed., p. 921. The term signified, according to the most correct view, "criminal offences."

(*d*) The object of this clause was to provide a remedy against long imprisonment without the old equivalent of a trial.

(*e*) The word "peer" is a subject of academic controversy. Coke considers it equivalent to "the verdict of a man's equals." In matters criminal the word "pares," so far as the greater barons were concerned, meant the

Confirmatio Chartarum.

The early portion of this enactment confirms the Great Charter of Liberties subscribed to by Henry III. and the Charter of the Forest. Later on the Act provides to the following effect :—

"Whereas divers of our people fear that the aids and tasks which they have given us towards our wars of their own good will might become a (perpetual) burden to them and their heirs, and so in like manner 'prises' taken throughout the realm by us, we therefore undertake (literally 'grant') that we will not levy such tasks, aids, or prises but by the common consent and for the common profit, save the ancient aids and prises of right accustomed. And whereas the greater part of the commonalty being aggrieved by the maltote of wool have petitioned us to remit the same and we do remit the same and undertake for ourselves and our heirs that we will not take such thing nor any other thing without the common consent and goodwill, saving, nevertheless, to us and heirs the custom of wool skins and leather granted before by the commonalty aforesaid."

Petition of Right.

The Petition contained the following clauses :—

I. That it was provided by a statute of Edward I. called *De Tallagio non concedendo* (*f*) that no tallage (*g*) or aid be levied by the King or his heirs without the assent of the Lords Spiritual and Temporal and the commonalty, and that it was enacted in the twenty-fifth year of the reign of Edward I. that no man be compelled to make loans to the King against his will, and by other laws of this realm it is provided (1 Rich. III. c. 2) that none be charged by any imposition called a benevolence. . . .

II. Nevertheless, commissions by means whereof your people have been in divers places assembled and required to lend money unto your Majestie and on refusal have been constrained to attend before the Privy Council, and in other places, and others

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right of every peer to be tried by his fellow-peers for treason or felony. As to civil matters and misdemeanours, all freeholders were a man's equals whether baron or no baron (see Langmead, 7th ed., pp. 105, 106).

(*f*) The authenticity of this enactment is doubted.

(*g*) Arbitrary levy on the royal demesne lands (Langmead, ch. 5).

of them have been imprisoned, molested and disquieted, and divers other charges have been levied upon your people by Lords-Lieutenant, Deputy Lieutenants, . . . justices of the peace and others. . . .

III. By the Great Charter of Liberties it is enacted that no freeman be imprisoned, disseised of his freehold or liberties or his free customs or be outlawed or exiled, &c., but by the lawful judgment of his peers, &c. (9 Hen. III. c. 29).

IV. By 28 Edw. III. c. 3 it was enacted that no man should be put out of his lands or tenements nor taken or imprisoned nor disinherited nor put to death without being brought to answer by due process of law.

V. Nevertheless, contrary to such statutes and laws, divers of your subjects have been imprisoned without cause shewed and on being brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commaunded to certify the causes of detainer, no cause was certified but that they were detained by your Majesty's special command.

VI. And whereas of late great companies of souldiers and mariners have been dispersed into divers counties, and the inhabitants have been compelled to receive them into their houses against the laws and customs of this realm.

VII. And whereas it was enacted by 25 Edw. III. c. 3 that none be forejudged of life or limbe contrary to the Great Charter and the law and by the said charter and other laws of this realm no man ought to be adjudged to death save by means of the law, yet nevertheless lately divers commissions under the Great Seal have issued forth, appointing commissioners to proceed within the realm according to the justice of martial law against such souldiers and marriners or other dissolute persons joining with them as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law and as is used in armies in tyme of war to proceed to the trial and condemnation of such offenders and them to cause to be executed and put to death according to the law martiall. By pretext whereof some of your Majesty's subjects have been put to death . . . (con-

trary to the laws). And also sundry grievous offenders by colour thereof claiming an exemption have escaped legal punishment by reason that divers officers and ministers of justice have unjustly refused to proceed against such offenders upon the pretence that such offenders were only punishable by martial law and by authority of such commissions as aforesaid, which commissions and all others of the like nature are wholly contrary to the laws of this realm.

The King assented to this petition of the Lords and Commons.

Bill of Rights.

I. After reciting the various abuses prevalent *temp.* James II., and that James II. having abdicated the Government, the throne was thereby vacant, proceeded to ordain—

(1) That the pretended power of laws or the execution of laws by regall authority without consent of Parliament was illegal.

(2) That the pretended power of dispensing with laws, or the execution of laws by regall authority as it hath been assumed and exercised of late, without consent of Parliament is illegal.

(3) That the commission for erecting the late Court of Commissioners for ecclesiastical causes and all other commissions of the like nature are illegal and pernicious.

(4) That the levying of money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegall.

(5) That the right of the subject to petition the King and all commitments and prosecutions for such petitioning are illegall.

(6) That the raising or keeping a standing army within the kingdom in time of peace unless it be with consent of Parliament is against law (*h*).

(7) That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.

(8) That elections of members of Parlyament ought to be free.

(9) That freedom of speech and debates or proceedings in Par-

(*h*) Hence the Mutiny Acts and the annual Army Act

lyament ought not to be impeached or questioned in any court or place out of Parlyament.

(10) That excessive bail ought not to be required nor excessive fines imposed nor cruell or unusuall punishment inflicted.

(11) That jurors ought to be duly impanelled and returned and that jurors which passe upon men in trialls for high treason ought to be freeholders.

(12) That all grants and promises of fines and forfeitures of particular persons before conviction are illegall and void.

(13) And that for redress of all grievances and for the amending, strengthening, and preserving of the lawes, Parlyament ought to be held frequently.

II. The Crown was bestowed as follows: William III. and Mary were to be King and Queen during their joint lives, and that during that period the regal power was to be exercised by William III., and after the death of the survivor the Crown was to go to the heirs of the body of Mary, and in default of such heirs to Anne of Denmark and the heirs of her body, and in default of such heirs to the heirs of the body of William III. An oath of allegiance, much in the same form as at present, was prescribed by the Act and also the oath of supremacy: "I, A B, do swear that I do from my heart abhor that damnable doctrine that princes excommunicated or deprived by the Pope may be deposed or murdered by their subjects or any other whatsoever. And I do declare that no foreign prince, person, &c., &c., hath any jurisdiction, &c., &c., within this realm." By section 9 of the Act persons professing the Popish religion or marrying a papist are to be excluded from the throne, and subjects are absolved from their allegiance.

For the rest of the Act see Langmead, p. 528, and also his note as to dispensing power on section 12, which is important.

The Bill of Rights was confirmed the following session, and became a statute of the kingdom.

The Act of Settlement.

By this Act the Crown was settled as follows, namely, on Sophia, Electress and Duchess Dowager of Hanover, daughter of Elizabeth, late Queen of Bohemia, who was the daughter of James I. It was further provided—

(1) That whosoever shall hereafter come to the possession of this Crown shall joyn in communion with the Church of England as by law established.

(2) That in case the Crown and Imperiall Dignity of this realm shall hereafter come to any person not being a native of this kingdom of England this nation be not obliged to joyn in any warre for the defence of any dominions or territories which do not belong to the Crown of England without the consent of Parliament.

(3) That no person who shall hereafter come to the possession of this Crown shall go out of England, Scotland or Ireland without consent of Parliament (repealed by 1 Geo. I., st. 2, c. 51).

(4) That from and after this time the further limitation by this Act shall take effect all matters and things relating to the well-governing of this kingdom which are properly cognisable in the Privy Council by the laws and customs of this realm shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same (repealed by 4 Anne, c. 8, s. 24; revived by 4 & 5 Anne, c. 20, s. 27).

(5) That after the said limitation shall take effect as aforesaid no person born out of the kingdoms of England, Scotland or Ireland or the Dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the Privy Council or a member of either House of Parliament, or to enjoy any office or place of trust either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown to himself or to any other or others in trust for him (repealed by the combined effect of various Naturalization Acts).

(6) That no person who has an office or place of profit under the King or receives a pension from the Crown shall be capable of serving as a member of the House of Commons.

(7) That after the said limitations shall take effect as aforesaid judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament it shall be lawful to remove them.

(8) That no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament.

Principal Articles of Act of Union of England and Scotland.

(1) That the two kingdoms of England and Scotland shall upon the 1st day of May, 1707, be for ever united into one kingdom by the name of Great Britain.

(2) That the succession to the monarchy of the United Kingdom of Great Britain after the death of Queen Anne without issue pass to Princess Sophia of Hanover and the heirs of her body, being Protestants. And that all papists and persons marrying papists shall be excluded from the throne of Great Britain and the Dominions thereunto belonging. And that in the event of the heir to the throne being or marrying a papist the same pass to the next Protestant heir.

(3) That the United Kingdom of Great Britain be represented by one and the same Parliament, to be styled the Parliament of Great Britain.

(4) That subjects of the said United Kingdom shall have equal rights of trade and navigation.

(6) That the customs duties be identical in both countries.

(7) That the laws as to excise be the same in both countries.

(9) Provisions as to land tax.

(16) That there be one coinage for both countries.

(17) Weights and measures are to be uniform (repealed by 41 & 42 Vict. c. 49).

(18) That laws concerning regulation of trade, customs and excise, and all laws made in Scotland concerning public rights (except such as are contrary to or inconsistent with this Act) shall remain in force unless altered by Parliament, but that no alteration in laws which concern private rights be altered by Parliament except for the utility of subjects within Scotland.

(19) This Article provides for the continuance of the Scotch courts of justice.

(22) That sixteen peers of Scotland may sit and vote in the House of Lords.

(23) That the said sixteen peers of Scotland shall have all privileges of Parliament enjoyed by English peers, including the right to try peers for treason or felony, and that all non-representative peers of Scotland or otherwise and their successors

APPENDIX F.

THE CRIMINAL AND CIVIL JURY.

The criminal jury is supposed by some to have originated from Ethelred's jury of presentment, but about this institution little that is reliable is known. Stubbs traces the jury to the Carolingian capitularies. In the reign of Henry II. a similar kind of jury is provided by the Constitutions of Clarendon. In 1166 the Assize of Clarendon ordained that twelve lawful men from each hundred and four lawful men from each township should be sworn to accuse reputed robbers, murderers, thieves, and receivers, and harbourers of murderers or thieves, and that the persons so presented be sent to the ordeal of water. By the Articles of Visitation (*temp.* Richard I.) the constitution of the grand jury established by Henry II. was further regulated and assimilated to the system then already in use for choosing the recognitors of the grand assize. The grand jury of those days were not judges of fact. They were neighbours who knew something of the transaction, either personally or from others they trusted. They had, however, to conceal nothing about which they had heard, and the rolls of the coroner and sheriff served as a check on them in this respect. At times the judges told the grand jury to institute enquiries in order to find out whether a given accusation was genuine. Till about 1215 reputed bad characters were sent to the ordeal, but even before that date we hear of another jury, the forerunners of the present petty jury, being impanelled to give the accused a further opportunity for acquittal. All these persons were witnesses rather than judges of fact like the jury of modern days. In the reign of Edward III. we hear of witnesses giving evidence who had no part in the verdict, but such evidence was given out of court.

In the reign of Henry IV. witnesses, who were clearly not

jurymen, gave evidence at the bar of the court, and in Fortescue's time juries were judges of fact, as at the present day.

In 1676 Penn and Mead were indicted under the Conventicle Act, and the jury at the trial, of whom Bushell was one, acquitted the prisoners. Bushell and his colleagues on the jury were fined and imprisoned for disregarding the ruling of the judge. On the application for a *habeas corpus* Vaughan, C.J., decided to the effect that a jury cannot lawfully be punished by fine, imprisonment, or otherwise for finding against the evidence or direction of the judge (*Bushell's Case*, Broom, Constitutional Law, p. 145). As to Fox's Libel Act, see *supra*.

By the Aliens Act, 1914—1918, any person interested may object in any proceeding, civil or criminal, to a foreigner being on the jury.

Foreigners are liable to serve on any jury after ten years' residence in England, if otherwise qualified. Women, if otherwise qualified, are also liable to serve.

The jury were originally summoned from the hundred, and as long as this practice prevailed they generally knew something about the case, but after a time they were selected from the body of the county. It is a strange fact that a man was not obliged, when charged with a criminal offence, to throw himself on his country for deliverance, and when the crime of which he was accused involved forfeiture he did not forfeit his property unless he pleaded. To make him plead he was crushed by heavy weights till he either pleaded or died (*peine forte et dure*). Strangeways was executed in this fashion in 1658, but the practice was not abolished till the latter half of the eighteenth century. When a man was appealed of felony he could challenge appellant to battle. Trial by battle was abolished in 1820 after *Thornton's Case*.

The Civil Jury.—In mediæval days there was no weighing or sifting of evidence. There was no trial, but a mode of proof was put forward. The demandant had to satisfy the court that his cause of complaint was genuine before defendant had to do anything (cf. Carter, English Legal Institutions, p. 222).

Cases were proved by compurgation, by an attested written document, or else by battle, or perhaps ordeal. Disputes respect-

ing freeholds were settled by battle. The plaintiff or demandant was unable to fight, but defendant could.

After the introduction of Henry II.'s grand assize, trial by battle, so far as civil cases, at any rate, were concerned, began to decline, for though, according to Glanville, defendant could choose between the assize and battle, the judges probably frightened him into choosing the assize for the settlement of the dispute.

At first the original writ commencing the action summoned a jury, or assize as it was then called, but after the introduction of pleadings the jury were summoned after joinder of issue by writ of *venire facias*, and this jury so summoned was known as the *jurata*. Hence the expression, *Assiza vertitur in juratam*.

The notion of adducing evidence unknown to the jury arose from the judge directing them to investigate facts before delivering a verdict. We see traces of this kind of direction in the functions of the present jury, who hear witnesses *in camera* before finding a true bill or otherwise. In Henry IV.'s reign witnesses gave evidence before the judge and jury, and the custom of taking the jury from the body of the county instead of the hundred contributed to converting the jury into judges of fact. As to challenges of jury and the rest of the law relating to them, the student is referred to the commentaries of Dr. Odgers on the common law.

It now appears to be the law that in a civil suit, as regards the King's Bench Division, that the Court has a discretion to disallow a jury in all cases except the following: libel, slander, malicious prosecution, false imprisonment, seduction, and breach of promise of marriage (*Ford* v. *Blurton* and *Ford* v. *Sauber* (1922), 38 T. L. R. 801), and a fresh difficulty has arisen owing to the County Courts Act, 1919, providing that the above actions may be commenced in a county court, but matters will be remedied by the proposed Administration of Justice Act, 1925, as the bill contains a clause giving either party the right to demand a jury in any of the above cases.

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Suggested Course of Reading for the Bar Examinations.

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HUNTER'S Introduction or KELKE'S Primer. SANDARS' Justinian. For final revision, GARSIA'S Roman Law in a Nutshell.

CONSTITUTIONAL LAW AND LEGAL HISTORY.

CHALMERS & ASQUITH. THOMAS'S Leading Cases. POTTER'S Legal History, or HAMMOND'S Legal History. For final revision, GARSIA'S Constitutional Law and Legal History in a Nutshell.

CRIMINAL LAW AND PROCEDURE.

ODGERS' Common Law, or WILSHERE'S Criminal Law, and WILSHERE'S Leading Cases. For final revision, GARSIA'S Criminal Law in a Nutshell.

REAL PROPERTY.

WILLIAMS (with WILSHERE'S Analysis), or EDWARDS. For revision GARSIA'S Real Property and Conveyancing in a Nutshell.

CONVEYANCING.

DEANE & SPURLING'S Introduction, and CLARK'S Students' Precedents.

COMMON LAW.

ODGERS' Common Law (with WILSHERE'S Analysis), or INDERMAUR'S Common Law; or CARTER on Contracts, and FRASER or RINGWOOD on Torts. COCKLE'S Leading Cases.

EVIDENCE AND PROCEDURE.

ODGERS' Common Law, or PHIPSON'S Manual of Evidence, and COCKLE'S Cases on Evidence. WILSHERE'S Procedure and Evidence.

EQUITY.

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COMPANY LAW.

SMITH'S Summary.

SPECIAL SUBJECTS.

Bills of Exchange, JACOBS or WILLIS. *Carriers*, WILLIAMS. *Carriage by Sea*, GARSIA. *Master and Servant*, SMITH. *Mortgages*, STRAHAN. *Partnership*, STRAHAN. *Sale of Goods*, WILLIS. *Wills*, MATHEWS or STRAHAN.

Suggested Course of Reading for the Solicitors' Final Examination.

For detailed Courses see Steele's Self-Preparation for the Final Examination.

COMMON LAW.

INDERMAUR'S Principles of the Common Law.
ANSON or POLLOCK on Contracts.
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